UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

In Re:	)	Docket No. 3:17-BK-3283(LTS)
	)	
	)	PROMESA Title III
The Financial Oversight and Management Board for Puerto Rico,	)	(Jointly Administered)
as representative of	)	
The Commonwealth of Puerto Rico, *et al.*	)	September 23, 2020
Debtors,	)	

The Financial Oversight and Management Board for Puerto Rico,	)	Docket No. 3:20-AP-00003(LTS)
as representative of	)	
The Commonwealth of Puerto Rico,	)	
Plaintiff,	)	
v.	)	
Ambac Assurance Corporation, *et al.*	)	
Defendants.	)	

The Financial Oversight and Management Board for Puerto Rico, *as representative of* The Commonwealth of Puerto Rico, Plaintiff, v. Ambac Assurance Corporation, *et al.* Defendants.	Docket No. 3:20-AP-00004(LTS)
The Financial Oversight and Management Board for Puerto Rico, *as representative of* The Commonwealth of Puerto Rico, Plaintiff, v. Ambac Assurance Corporation, *et al.* Defendants.	Docket No. 3:20-AP-00005(LTS)

HEARING ON MOTIONS

BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ALL PARTIES APPEARING TELEPHONICALLY

For The Commonwealth of Puerto Rico, *et al.*:	Mr. Martin J. Bienenstock, PHV Mr. Michael A. Firestein, PHV Mr. Colin Kass, PHV
For Official Committee of Unsecured Creditors:	Mr. Luc Despins, PHV
For Ambac Assurance Corporation:	Ms. Atara Miller, PHV
For National Public Finance Guarantee Corp.:	Mr. Robert Berezin, PHV
For Assured Guaranty Corp. and Assured Guaranty Municipal Corp.:	Mr. William J. Natbony, PHV
For AmeriNational Community Services, LLC, and Cantor-Katz Collateral Monitor, LLC:	Mr. Douglas Mintz, PHV Mr. Nayuan Zouairabani Trinidad, Esq.

Proceedings recorded by stenography. Transcript produced by CAT.

I N D E X

San Juan, Puerto Rico

September 23, 2020

At or about 9:04 AM

* * *

THE COURT: Good morning. This is Judge Swain speaking.

MS. NG: Hi, Judge. It's Lisa.

THE COURT: Ms. Tacoronte, would you please announce the case?

COURTROOM DEPUTY: Good morning, Your Honor.

THE COURT: Good morning.

COURTROOM DEPUTY: The United States District Court for the District of Puerto Rico is now in session. The Honorable Laura Taylor Swain presiding. God save the United States of America and this Honorable Court.

For the record, case number 17-3283, *In Re: The Financial Oversight and Management Board for Puerto Rico as representative of the Commonwealth of Puerto Rico, et al.* Adversary Proceedings 2020-03, 2020-04, and 2020-05 for motion hearing.

THE COURT: Thank you, Ms. Tacoronte.

Again, buenos dias. Good morning, everyone. Welcome counsel, parties in interest and members of the public and press. Today's hearing is for oral argument on the motions for partial summary judgment that have been filed as Docket

Entry No. 43 in Adversary Proceeding No. 20-003, Docket Entry No. 40 in Adversary Proceeding No. 20-004, and Docket Entry No. 55 in Adversary Proceeding No. 20-005.

To ensure the orderly operation of today's telephonic hearing, all parties on the line must mute their phones when they are not speaking. If you are accessing these proceedings on a computer, please be sure to select mute on both the Court Solutions dashboard and on your phone. When you need to speak, remember that you must unmute on both the dashboard and the phone.

I remind everyone that, consistent with court and judicial conference policies and the Orders that have been issued, no recording or retransmission of the hearing is permitted by any person, including but not limited to the parties, members of the public or the press. Violations of this rule may be punished with sanctions.

I will be calling on each speaker during these proceedings in the agreed order that is enumerated in the Joint Informative Motion filed yesterday as Docket Entry No. 108 in Adversary Proceeding 20-003, filed as Docket Entry No. 101 in Adversary Proceeding 20-004, and Docket Entry No. 122 in Adversary Proceeding 20-005.

When I do call on you, please begin your remarks by identifying yourself by name for clarity of the record. If you wish to be heard out of order or otherwise need to make a

remark, please state your name clearly at the end of an argument segment and request to be heard. And remember, you'll have to unmute on both your phone and the Court Solutions dashboard. Don't just use the wave function on the Court Solutions dashboard, because I may not be able to see that. I will respond to your request and will call on each speaker if more than one person wishes to be heard and I am granting the request.

Please don't interrupt each other or me during this hearing. If we interrupt each other, it is difficult to create an accurate transcript of the proceedings. But having said that, and as usual, I apologize in advance for breaking this rule, because I may interrupt if I have questions or if you go beyond your allotted time. If anyone has difficulty hearing me or another participant, please say something right away.

The time allotments for each matter and the time allocations for each speaker are set forth in the Joint Informative Motion. I encourage each speaker to keep track of his or her own time. The Court will also be keeping track of the time and will alert each speaker when there are two minutes remaining with one buzz, and when time is up with two buzzes. Here is an example of the buzz sound.

(Sound played.)

THE COURT: If your allocation is two minutes or

less, you will just hear the final two buzzes.

When we take a break, I'll direct everyone to disconnect and dial back in at a specified time. I'm planning to call breaks at the end of the arguments by the movant and parties supporting the motions, and then between the arguments in opposition to the motions and the rebuttal arguments. If an argument participant needs me to call a break at another time, unmute on both your phone and the Court Solutions dashboard and say something at an appropriate time.

The timing for today's proceedings is from 9:00 to 12:45 for the morning session, and then we will resume at 2:15 if necessary. I think that covers all of the logistics and housekeeping issues, and so now we will turn to the oral argument.

The first speaker is Mr. Bienenstock on behalf of the Oversight Board, who has been allotted 68 minutes.

Mr. Bienenstock.

MR. NATBONY: Judge Swain, I'm sorry. This is William Natbony on behalf of the Monoline Defendants. Before we begin, defendants just had a quick request on time allocations.

THE COURT: Yes.

MR. NATBONY: In view of our preparation, we realized we were perhaps a bit optimistic in terms of the ability to get through our arguments in the 96 of 120 allocated minutes

requested. As such, we would respectfully request that an additional ten minutes be added to both Ms. Miller and myself to be safe.

The overall time requested would still be within the time allocated by the Court. So if granted, both Ms. Miller and I would have 40 minutes, rather than 30 minutes, each, and Mr. Berezin would follow with 20 minutes.

Thank you, Your Honor.

THE COURT: Thank you. And so that still keeps you under the 120 minutes?

MR. NATBONY: Yes, Your Honor.

THE COURT: I'm sorry. Does anyone else wish to be heard on that? I thought I'd heard another voice.

(No response.)

THE COURT: That request is granted. And so just to confirm, Mr. Natbony for Assured will be allotted 40 minutes, Ms. Miller for Ambac will be allotted 40 minutes, Mr. Berezin will be allotted the 20 minutes that were requested, and the DRA Parties will be allotted the 16 minutes that were requested.

MR. NATBONY: Thank you, Your Honor.

THE COURT: Is that your intent?

MR. NATBONY: Yes, Your Honor. Thank you.

THE COURT: Thank you.

All right. Then we will open with Mr. Bienenstock.

Mr. Bienenstock, you need to unmute on both the dashboard and your phone.

And Ms. Ng, would you do whatever you can do to unmute from our end?

MR. BIENENSTOCK: Good morning, Your Honor. Can you hear me now?

THE COURT: Yes, I can. Thank you.

MR. BIENENSTOCK: Okay. Then I just wanted to wish the Court and all parties best of health and the end of the situation as quickly as possible.

May it please the Court, my name is Martin Bienenstock of Proskauer Rose, LLP, attorneys for the Oversight Board, as the Title III representative of HTA and PRIFA, and on behalf of C -- of HTA, and on behalf of PRIFA and CCDA, which are not Title III debtors.

Your Honor, what I hope to cover in my 68 minutes, and then my colleagues will cover the 56(d) issues later and some ancillary issues that I may not get to, are largely issues raised in the sur-replies, because the other issues have been fully briefed. And on the issue of law of the case, which defendants make an issue of in their sur-replies, basically we're taking a very practical view.

While the Court has discretion to utilize its Stay Relief Opinions as law of the case, we recognize two things: First, the Court was very careful in those Stay opinions to

say it was ruling on whether the defendants had established colorable claims; and second, as a practical matter, we don't think the Court is going to enter a judgment here in the summary judgment motions that the Court thinks is wrong.

So our position is simply this: We think the Court was right in all of its reasoning that led to its Stay Relief Opinions. The defendants have raised nothing since then to demonstrate anything was wrong. And on that, and subject to any questions, of course, the Court may have, I'm not going to retread that ground on the security interest, property interest, et cetera, except perhaps tangentially, with one exception.

In the HTA Sur-reply, the defendants, starting at approximately paragraph nine on page seven of their Sur-reply Brief, make an argument that at least in respect of HTA, that they have a security interest in the monies held in bank accounts at the Commonwealth, because, as we understand their logic, when the payment of the various taxes and license fees came into the Commonwealth, they say they had a perfected security interest in that. And when it was deposited into a deposit account, the deposit account became proceeds of that. And that would give them an exception to the rule that to have a security interest, a perfected security interest in a deposit account, you need a control agreement.

I will take just the next few minutes to point out

why they are wrong. We understand, and I've laid out now the logic, that they have to allege something to get around the fact that they acknowledge and admit that they have no control agreement on the bank accounts of the Commonwealth, which would ordinarily prevent perfection. So the only thing they can say is its proceeds of something else in which they have a security interest.

To do that, they have to show that the Commonwealth has authenticated their security interest in the money or other funds it takes in, which then gets converted into the deposit account. And what they say in their -- in paragraph nine is that all they have to show is that they had a security interest in a medium of exchange.

What they leave out in the definition of "medium of exchange" is the Uniform Commercial Code requires that the medium of exchange has to be adopted by the government as a medium of exchange. And the government has not adopted deposit accounts as a medium of exchange, and they don't contend that it does. They just ignore that requirement.

They have two problems in establishing their deposit accounts as proceeds of something they had a perfected security interest in. The first is they assume that the payments for the various license fees, gas taxes, cigarette taxes, et cetera, were made in cash, and there's no basis for that assumption. But let's even assume that they were right.

They then have to show that the Commonwealth has authenticated the fact that it is holding that money for them, for the creditor.

And if the Court -- the Court doesn't have to do this now, but I'll just give the references. In 9 L.P.R.A. Section 2021 and in 13 L.P.R.A. Section 31751(a)(1), the Court will see that the relevant statutes provide that the special accounts that the monies go into are not held for the creditors. They're held for HTA for its corporate purposes.

So the defendants fail the first test to establish that the Commonwealth has authenticated the creditors' security interest in what it receives as payment for the various taxes and things that formally would ultimately allocate it to HTA.

The next issue that I'm going to take up is the issue that they raise that the statutes in Puerto Rico requiring the Commonwealth to transfer monies to the three instrumentalities are enforceable, notwithstanding *Ohio v. Kovacs*, in which the Supreme Court ruled that the requirement, the statutory requirement to either clean up a contaminated site or to pay for the cleanup was simply a claim in bankruptcy.

The fundamental error that the defendants make is not recognizing that all laws, whether statutes, common law, or other sources of law are enforced by orders. And that was the case in *Ohio v. Kovacs*. The common law and statutory law in

Ohio led to an order requiring the debtor, the ultimate debtor, to pay for a cleanup.

The Supreme Court treated the claim as a statutory claim. It said, "the State argues, however, that the injunction it has secured is not a claim against Kovacs for bankruptcy purposes, because Kovacs' default was a breach of the statute, not a breach of the ordinary commercial contract, which concededly would give rise to a claim. And Kovacs' breach of his obligation under the injunction did not give rise to a right to payment under the meaning of 101(4)(B). We are not persuaded by either submission."

And then the Supreme Court goes on to say that, to satisfy the purposes of the Bankruptcy Code claim, the word "claim" has to have a broad definition, which would definitely encompass the statutory obligation. So bottom line, the Monolines' argument that *Kovacs* applies to orders and not statutes is simply not right and logically doesn't make sense, because all statutes, to enforce them, ultimately lead to orders.

Now, the next argument I wanted to address is the Monolines' argue that statutes cannot be rejected as executory contracts and must be complied with. And they cite *Kentucky Employees Retirement System*, a recent Sixth Circuit Court of Appeals decision. They -- by doing that, they create the illogical proposition that while a debtor may breach a promise

to pay, it may not breach something less, a promise to fund another entity. Because that's what they want the Commonwealth to do here, to fund HTA, PRIFA and CCDA.

The short answer to their rejection argument is these statutes don't have to be rejected because rejection only applies to executory contracts, and these statutory -- these statutes are not executory. They are one-way obligations of the Commonwealth to fund the three instrumentalities at issue.

The statutes here simply impose obligations on the Commonwealth to transfer money to HTA, PRIFA and CCDA. No performance by HTA, PRIFA or CCDA is required. Thus, the statutes here start out as pre-petition claims against the Commonwealth, so rejection is unnecessary to reduce the statutes to claims. Thus, the statutes are already the equivalent to pre-petition claims. They don't have to be rejected.

Now, we recognize, and the defendants point out that it was in our brief, that we mentioned the rejection power, but we mentioned it in the context that these things result in claims, the same as rejection does, not that the statutes were executory contracts.

To best illustrate the fallacy of the Monolines' argument, the Court only needs to consider its consequences. The first consequence is that the Excise Tax Statutes in the case of PRIFA would be the equivalent of nondischargeable,

specifically enforceable claims. The second consequence is that not only the Excise Tax Statutes, but all Puerto Rico law requiring debts to be paid, including the Puerto Rico Constitution requiring the general obligation debt to be paid first from all available resources would become nondischargeable, specifically enforceable debt.

Puerto Rico, like all states and territories, also has common law, such as contract law, entitling all debtholders to enforce their debt contracts. Jurisprudential law is no less enforceable than statutory law. So accepting the Monolines' argument means all debt must be paid in full because that's what Puerto Rico law says.

Unsurprisingly, the statutory and common law of all states and territories requires that valid debt be paid. If the Monolines are correct, we better notify all bankruptcy judges and debtors across the United States that all debt must be paid in full as long as local law requires it. This argument dovetails with the Monolines' argument against preemption, which I will address right after addressing the citation to the *Kentucky Employees,* Sixth Circuit decision.

There, the Chapter 11 debtor in possession, Seven Counties, was a designated member of the Public Retirement System and became required to pay to the pension plan in 2014 an amount equal to 39 percent of each employee's salary. Even at a 24 percent level, Seven Counties could not afford to

operate if it had to pay these pension contributions.

Kentucky Employees required the Chapter 11 debtor to make the payments. The decision was entirely based on 28 U.S.C. Section 959(b). That section applied because Seven Counties was held to be eligible for Chapter 11, unlike municipalities which are ineligible pursuant to Bankruptcy Code Sections 109(c) and (d).

To be a debtor under Chapter 11, the debtor must be a railroad or a person, and "person" is defined by Bankruptcy Section 101(41) to exclude governmental units like the Commonwealth. *In re Jefferson County*, 484 B.R. 427, at page 433, holds that 28 U.S.C. 959 does not apply to municipal debtors for several reasons, including Tenth Amendment concerns and the practicality that, at the end of the day, any enforcement action would require controlling the debtor county's money, and that is automatically stayed.

There, the City of Birmingham and its mayor wanted to sue to compel the debtor, Jefferson County, not to close inpatient and emergency room services for the indigent. Notably, neither *Kentucky Employees* nor *Jefferson County* addressed statutes requiring a Chapter Nine debtor or Title III debtor to make certain payments until certain pre-petition bonds were paid in full. The statutes here require exactly that.

Therefore, here one of the primary issues is whether

PROMESA, inclusive of its Title III, preempts those statutes. As the Court knows from our briefs, PROMESA contains multiple independent sources of preemption. They certainly include PROMESA Sections Four, 108(a)(2), 202, 207 and Title III.

Now, the Monolines argue the Excise Tax Statutes are not impliedly preempted. Starting in 1800, the United States has enacted bankruptcy statutes. None of them up through the current Bankruptcy Code includes express preemption language, except as the Court has seen in Sections 903 and 904 of the Bankruptcy Code and in Section 303 of Title III. It was never necessary to have such express preemption language.

The Monolines' argument also proves too much, much too much. The Excise Tax Statutes require the Commonwealth to transfer certain excise taxes to PRIFA until PRIFA's bonds are repaid. Puerto Rico's Constitution requires the Commonwealth's General Obligation Bonds to be paid first from all available resources, which include the excise taxes, when there is otherwise insufficient revenues to pay all appropriations. Puerto Rico's common law provides for contract damages and the enforcement of judgments for contract damages.

This is all to say the Monolines, without exaggeration, are asking the Court to repudiate the last 220 years of bankruptcy law and jurisprudence by enforcing laws requiring debt repayment in full, even during the debtors'

Title III case.

Aside from implied preemption, PROMESA contained Sections Four, 108(a)(2), 202 and 207, which are totally inconsistent with the enforcement of the Excise Tax Statutes, or they're being rendered non-dischargeable. If all the instrumentality debt and all the Commonwealth GO debt must be paid in full because Title III does not expressly preempt all those laws, then there's no restructuring available.

Moreover, PROMESA Title III does not grant the priority to PRIFA and HTA'S claims against the Commonwealth for appropriations. That is yet another inconsistency between Title III and the Commonwealth law triggering preemption.

THE COURT: Mr. Bienenstock, I would just like to ask you about the scope of the relief that you're asking for in your preemption directed claim here in these partial summary judgment motions. Are you saying that the budgets or the general budgetary power of the Oversight Board under PROMESA preempts any claim against the Commonwealth under these transfer statutes completely, or that it is preempting any obligation to pay in a particular period covered by the particular budget?

MR. BIENENSTOCK: Your Honor, I thank you for raising that. It was a point I was definitely going to get to quickly. And I'd love to address it now, and obviously will since Your Honor asked. And I appreciate the way Your Honor

parsed and articulated the issues.

We are most definitely requesting the latter relief Your Honor mentioned. Namely, that, among other reasons, PROMESA Section 202 preempts the Commonwealth's obligation to transfer money to the instrumentalities pursuant to those allocable revenue statutes in the briefs.

The other issue Your Honor articulated was --

THE COURT: Preempts that obligation for the period covered by the budget? Wipes it out entirely? Leaves it as something that might have to be made up in the future? That's what I'm trying to really understand.

MR. BIENENSTOCK: Okay. In terms of eliminating the obligation, we're saying that it eliminates the obligation at a minimum for the period of the Fiscal Plan, which can be 20, 30, or 40 years. And, in fact, our Proposed Plan of Adjustment provides additionally that we have a whole list of statutes that we regard as being preempted, and ask, as part of the confirmation order, that the Court would rule on that. But for this purpose, and for this Summary Judgment Motion, we're saying that the obligation is totally preempted.

Now, the statutes provide that the obligations last while the debt is outstanding. The debt, of course, will be dealt with in the Plan of Adjustment. So the period during which the debt will be outstanding is not going to be that long, but we are saying it's for the total period, or any

period we put in the Fiscal Plan and Budget, which has been a pretty long period, because it has to provide for the future.

The second issue that the Court asked I think is, are we saying it preempts the claim of the creditors against the Commonwealth for not making those transfers to the instrumentalities. And, as Your Honor knows, the defendants have raised in their sur-replies that, in fact, they say it's an excuse, a reason not to grant summary judgment, that we have raised the possibility that they might have unsecured claims. And I -- and these are precisely the claims we were thinking of.

If -- in the case of these instrumentalities, we've been referring to them in the briefs as the non-impairment Puerto Rico statutory provisions. The Commonwealth has these laws on its books, and they're all in the excerpts that we filed for today, providing that the Commonwealth agrees to any holder of the debt that it will not change these allocations to reduce the taxes to below certain levels and will not change the statutes adversely to the instrumentalities, HTA, PRIFA and CCDA. Because these statutes expressly refer to a commitment to the bondholders, we were acknowledging the possibility that the bondholders might have an unsecured claim for these statutes not being carried out or being preempted.

Now, the contrary argument would be that preemption eliminates the statute so they can't have a claim. That

really hasn't been briefed and wasn't one of the things on which we asked for summary judgment. Additionally, if they had an unsecured claim for that, what would be the amount of it? It's not -- they don't have a claim that the Commonwealth agreed to pay their debt. The Commonwealth was agreeing to transfer money to the instrumentality for its corporate purposes.

So the amount of that claim might be very small, but whatever, it's not subject to the instant summary judgment motions, because we anticipated that if it ever comes down to the amount of that unsecured claim, there would need to be a hearing on disputed facts most likely.

I hope that responds to Your Honor's inquiry.

THE COURT: Most of it. I just have a follow-up inquiry.

MR. BIENENSTOCK: Sure. Sure.

THE COURT: So what do you mean when you are requesting disallowance of the claim as preempted? These are claims that have a figure on them and 50 pages of explanatory theory behind it. They haven't filed a separate claim for each theory.

So are you looking for disallowance of the claim to the extent it's premised on preemption of a certain subset of the obligations, but not necessarily to wipe out this potential residual claim under the non-impairment covenant?

What do you expect me to do by way of a ruling in relation to the claims as they have been filed?

And this is obviously a question that I could ask in a variation for each of these causes of action, but what does disallowance mean for purposes of this motion practice?

MR. BIENENSTOCK: Okay. Well, first and foremost, on the counts we chose on which to ask for summary judgment is that we're asking that the Court determine that there are no secured claims for any of these things, because -- largely for all the reasons and more that the Court mentioned in its Stay Relief Opinions of September 9.

In terms of disallowance of unsecured claims, the only unsecured claim that we're acknowledging need not necessarily be disallowed as a result of these motions are the unsecured claims for not carrying out the unimpairment statutes.

THE COURT: Thank you.

MR. BIENENSTOCK: Okay. I just wanted to make -- I hope that answered the Court's question.

The next issue that I was going to address is our response to defendant's argument that the Commonwealth has no right to default and that such a right would be a disputed fact. Monolines argue the Commonwealth may not default without legislation requiring default. Their Sur-replies make it sound like the Commonwealth or any debtor's right to

default is a new epiphany. Of course it's not.

We trust the Monolines each understood that commencing the Title III case would halt payments on unsecured pre-petition debt. When we say the Commonwealth had a right to default, we did not mean to say the Commonwealth could default with impunity. We mean, generically, the Commonwealth had a statutory, contractual duty to pay money and failed to do it. It defaulted. Whether the Commonwealth has defenses such as preemption is another issue.

Now, I do want to mention once for all of these arguments that there is a genuine issue as to whether a statute requiring an appropriation, or providing for an appropriation or a transfer of monies to an instrumentality is an enforceable claim, because governments appropriate money and then they can change their mind and reappropriate differently. And we've never heard of an instrumentality such as HTA, et cetera, suing the government for changing its mind, saying, no, you owed me a particular appropriation and now you have to give it to me. But that's an issue that is not being addressed in the summary, but here we're assuming for argument's sake that they do lead to claims.

That the Commonwealth definitely had the right to default is supported by the Supreme Court's decision in *Faitoute Iron & Steel Company v. City of Asbury Park*, 316 U.S. 502, at page 511. The Supreme Court ruled, "the necessity

compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired."

Modifying an original arrangement euphemistically means default and negotiate a restructuring. The Supreme Court used the word "discharge" to mean satisfied under bankruptcy law, not merely to mean a bankruptcy discharge of liability.

The whole point of *Faitoute* was that the restructuring of the municipality's debt under state law, whereby less than full interest was paid, was not an impairment of contractual obligations under the Contract Clause, because the restructuring enabled the bondholders to be paid the value or more than the value of their contractual obligations. Without the restructuring, all they could do was ask the legislature to raise taxes to pay them, which is the same remedy the Monolines have here absent Title III.

The Monolines' Contract Clause arguments erroneously assert the Contract Clause does not give rise to dischargeable claims and erroneously hinge on nonmeritorious Contract Clause claims. The Monolines' insistence that the Commonwealth may not default without legislation authorizing the default clearly arises from the Monolines' recognition that there cannot be a Contract Clause violation without state or

territory legislation.

But where the Monolines and the Commonwealth part company is the next step. Namely, whether a statute requiring a default, no different from the Governor ordering a default, impairs contractual obligations. The Monolines assume it does, and that assumption is wrong.

The Contract Clause expressly refers to impairing the "obligation of contracts." The Monolines' contractual rights to have their bonds repaid were not impaired by the Commonwealth's failure to pay timely and to default. Whatever contractual obligations the Monolines could enforce before the default and the legislation remain contractual obligations they can enforce in Title III. In fact, the moratorium legislation and executive orders went out of their way to preserve all the Monolines' rights to principal and interest.

Insofar as the Monolines' rights to have the Commonwealth transfer money to HTA, PRIFA and CCDA, the Monolines always had the risk the Commonwealth would fail to do so and never had any collateral security for a Commonwealth default. But whatever rights the Monolines had to have the Commonwealth transfer money to those entities still exists, subject to preemption by PROMESA, a federal law.

On pages 285 through 289 of Your Honor's decision in *Ambac Assurance v. Commonwealth of Puerto Rico*, at 297 F. Supp. 3d. 269, the Court thoroughly analyzed the Contract

Clause claims arising out of the moratorium statutes and orders and the Fiscal Plan. As the Court knows, in the Stay litigation, the Monolines argued the First Circuit's affirmance was on jurisdictional grounds and somehow gutted this Court's rulings on the merits. But for present purposes, that doesn't matter.

The First Circuit did not discuss the Contract Clause claims and certainly did not criticize this Court's reasoning. There is no reason for this Court today to analyze the claims differently than it did in its affirmed decision.

This Court concluded at page 289, "plaintiff has thus failed to meet its burden of pleading facts sufficient to allow the Court to draw a reasonable inference that the moratorium legislation, moratorium orders and Fiscal Plan Compliance Act were unreasonable or unnecessary to effectuate an important government purpose. And as claimed above, plaintiff has failed to allege plausibly that the Fiscal Plan is an exercise of Commonwealth legislative power. Accordingly, the first claim for relief is dismissed," et cetera.

Now, this Court --

THE COURT: Now, you're not moving here -- just one second. Sorry, Mr. Bienenstock.

You're not moving here on reasonableness and necessity; is that correct?

MR. BIENENSTOCK: I didn't hear the last part of the question, Your Honor.

THE COURT: The motion here is not premised on lack of a showing of reasonableness and necessity. The motion, as I understand it, as against the Contract Clause claims is on the question of whether there is an impairment; is that correct?

MR. BIENENSTOCK: We didn't -- we didn't brief the reasonableness and necessity issues, but we do believe that's implicit. I mean, they're -- they pleaded less in their Proofs of Claim than they did in the Stay litigation.

THE COURT: All right. I hear you.

MR. BIENENSTOCK: In this Court's September 9, 2020, Opinion on Stay Relief Motions regarding HTA and PRIFA, the Court ruled at page 16, "movants' proposed claims plainly stem from their bond claims, and although styled as requests for declaratory relief, ultimately are vehicles for asserting rights to payment of amounts outstanding under various bond issues. Indeed, movants identified their constitutional and statutory theories in their Proofs of Claim as bases for their claims for damages on account of defaults that occurred on the relevant bonds."

In footnote 14 of that Opinion, the Court noted "notably, although movants insist that their secured status cannot be determined until the validity of the territorial

legislation has first been resolved, nowhere do they explain how the relief they intend to seek through their proposed claims would have granted, provide them with a security interest that they do not otherwise have."

Nothing has changed between then and now, Your Honor. The Monolines now contend the Contract Clause violations cannot be claimed because their only remedies are declaratory relief and equitable relief. If the Monolines are serious, they have now admitted they do not have Contract Clause claims within the meaning of Title III. That is good. Taking them at their word, they are not asserting secured claims or unsecured claims arising out of their allegations that the Commonwealth violated the Contract Clause.

The Commonwealth submits there have been no Contract Clause violations in the first place, but before analyzing that for purposes of summary judgment, I want to explain why their assertions about only being entitled to declaratory and equitable relief are moot. Outside bankruptcy or Title III, it is understandable that if a state or territory enacts a law unconstitutionally impairing obligations of contract, the remedy is to strike the law, although striking or nullifying the law does not unimpair the contractual obligations. One would think the contract parties would also have a money claim, but the Monolines here say they only have rights to equitable and declaratory relief at page 24 of their Sur-reply

concerning PRIFA.

The reason we submit that nullifying the law is moot, however, is that eliminating the moratorium laws and orders has no, zero impact on the Commonwealth or HTA as Title III debtors, because neither the Commonwealth nor HTA are required to pay their pre-PROMESA and pre-Title III obligations until the effectiveness of their plans of adjustment. And while PRIFA and CCDA are not Title III debtors, they do not have the money to pay bondholders. So HTA need not pay its bondholders until its Plan is effected.

The Commonwealth may never need to transfer monies to HTA pursuant to the pre-petition statutes requiring annual transfers if those statutes are preempted. If they are not preempted, at most they represent pre-petition obligations, which are not payable until the effectiveness of the Commonwealth's Plan of Adjustment.

Impairing contractual obligations by its terms shows it leads to breaches of contract. The contracts here are bond contracts for the payment of money, and according to the Monolines, the statutes requiring the Commonwealth to transfer monies to HTA, PRIFA and CCDA. The Monolines' concession, however, that impairing contractual obligations does not give rise to claims for payment of money is most welcome.

Second, though the Monolines deny it, the cause of the Commonwealth not transferring money to HTA, PRIFA and CCDA

is Title III and PROMESA Section 108(a)(2), 202 and 207, among others, not the moratorium statutes and orders. The Monolines contend the Oversight Board is making a new argument by alluding to federal law, but the Complaints allege, such as PRIFA Complaint paragraph 134, federal law stopped payments to the instrumentalities. Count 37 at page 64 is a count devoted to the retention of PRIFA revenues being due to PROMESA. Count 5 at page 48, retention of CCDA revenues per PROMESA.

Moreover, the Oversight Board's opening Summary Judgment Briefs argued the retention of the revenues at issue were due to PROMESA. For example, argument one of the PRIFA Summary Judgment Motion Brief filed April 28 at page 32. There is no basis on which the Monolines can have a secured claim against the Commonwealth for its alleged default, and there is no basis for a nondischargeable claim, because Bankruptcy Code Section 944(b) and (c) list the only nondischargeable claims in Title III, and so-called constitutional claims are not on the list. Summary judgment on those two points, unsecured and dischargeable, is clearly warranted.

Outside Title III and PROMESA, debtors default all the time. No one contends Chapter Nine debtors such as Detroit, or Chapter 11 debtors such as JC Penney, Neiman Marcus, Hertz Rent-A-Car are authorized to default by law. Default means they are doing something contrary to a legal

obligation. The same as every human being is capable of sinning, every debtor can fail to satisfy a legal obligation.

That is what Title III and Chapters Nine and 11 handle, defaults not allowed by law. Indeed, all debtors can default. What if they lack the money to pay? They have to default.

To create a material disputed fact, the Monolines contend, whether the Commonwealth defaulted due to a moratorium statute or another reason must be determined. But whether the Governor picks up the phone and tells the Secretary of Treasury not to make a payment, or the Commonwealth legislature enacts a statute providing a payment shall not be made makes no substantive difference, because defaults for either reason leave intact the Commonwealth's contractual obligations which the Monolines enforce by filing Proofs of Claim.

Moreover, whether the Commonwealth may default is a legal question, not a fact question. The Supreme Court answered that question in the affirmative in *Faitoute*, which I explained earlier. But even if the right to default were a fact issue in dispute, the Contract Clause claims can be determined without reference to the right to default for two reasons. First, a default with or without legislation does not impair contractual obligations, which is what the Contract Clause protects.

HTA's contractual obligation to pay its bondholders was not eliminated by the Commonwealth's default or by any moratorium order or executive order requiring the default. The Commonwealth's obligation, if any, to transfer money to HTA, PRIFA and CCDA will be treated in the Commonwealth's Title III case. This Title III case will pay the Monolines the value of their contractual obligations from the Commonwealth, if they have any.

It is important to understand that the Contract Clause protection of contractual obligations does not convert bad debt into good debt. For instance, if a debtor is worth 600 dollars and owes ten creditors 100 dollars apiece, the value of each creditor's claim is 60 percent of its claim amount. The Contract Clause doesn't convert a claim worth 60 cents on the dollar into a claim worth 100 cents on the dollar.

Here, the Monolines' rights to obtain money from HTA, PRIFA or CCDA were dependent on each of those entities receiving money from the Commonwealth. Before PROMESA, the Commonwealth determined it needed to retain its money for other purposes. Congress determined the Commonwealth was in a fiscal emergency and could not provide effective services to its residents. Contract Clause did not eliminate the risk, which always existed. *Faitoute* provided, the Constitution is intended to preserve practical and substantial rights, not to

maintain theories.

Second, the Contract Clause claim depends, among other things, on state legislation impairing contractual obligations. Once PROMESA was enacted on June 30, 2016, and the Oversight Board was appointed on August 31, 2016, many provisions of PROMESA, a federal law, barring debt repayment, among them are Section 207, under which the Oversight Board has to approve any type of exchange, modification, repurchase, issuance, redemption of debt. Section 202 granting budget power over the -- to the Oversight Board --

THE COURT: Before you go on, Mr. Bienenstock, I'd just like to stop at 207 for a minute.

MR. BIENENSTOCK: Yes.

THE COURT: So 207 doesn't include in its enumerated list of actions requiring Oversight Board approval, ordinary course repayment. It talks about modification. It talks about redemption, which I understand colloquially to be buybacks of the outstanding bonds, as opposed to paying P&I amortization. But it's your position that even regularly scheduled payments on bonds under 207, once PROMESA was enacted and the Oversight Board came in, required specific Oversight Board approval?

MR. BIENENSTOCK: Well, it includes, Your Honor, the word "redeemed." I mean, the ordinary -- the ordinary course payment is a redemption of that amount of the debt.

THE COURT: Thank you.

MR. BIENENSTOCK: But if for whatever reason the Court does not agree with that interpretation, as I mentioned, 202, the power over the budgets, 108(a)(2), that they can't do anything that, in the Oversight Board, impairs or defeats the purposes of PROMESA, which would certainly be paying unsecured pre-petition debt, and all of Title III, are reasons why, absent any legislation, payment of the debt they want of the obligations to the instrumentalities, if there were obligations, was stopped. And that's the major point. So if you take 207 out of the equation, it doesn't matter. There are, you know, Title III, 202, 108(a)(2), there are lots more reasons why the debt could not be repaid.

Now, the Monolines claim that the Oversight Board, as a Commonwealth representative, cannot avoid liens as trustee in bankruptcy under the Puerto Rico version of the Uniform Commercial Code. They are wrong. First, PROMESA Section 301(c)(7) provides that when a Bankruptcy Code provision incorporated into Title III uses the word "trustee," the word "trustee" means Oversight Board. Second, PROMESA Section 301(a) incorporates Bankruptcy Code Section 544. The Monolines seem to have concentrated on 544(a), but I'm concentrating on 544(b)(1).

That provides a trustee, meaning the Oversight Board, because it's incorporated into Title III, may avoid any

transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that is voidable under applicable law by a creditor holding an unsecured claim that is allowable.

Here, the applicable law is the Puerto Rico Uniform Commercial Code. UCC Section 9-102(a)(52) defines lien creditor to include a trustee in bankruptcy. Therefore, under PROMESA Section 301(c)(7) and Bankruptcy Code Section 544(b)(1), the Oversight Board is a trustee and is authorized to avoid any transfer voidable under applicable law by a creditor holding an allowed claim. Thus, the Oversight Board, in its capacity under Section 544 as a trustee, having the status of a lien creditor pursuant to applicable law, the Puerto Rico Uniform Commercial Code, can avoid security interest junior to lien creditors. UCC Section 9-317(a)(2) renders unperfected security interests junior to lien creditors.

The Monolines also argued that Puerto Rico's sovereign immunity bars the trustee's hypothetical and judicial lien from attaching to Commonwealth property. In response, the Commonwealth pointed out the Bankruptcy Code Section 106, made applicable by PROMESA Section 301(a), waives the Commonwealth sovereign immunity.

In their Sur-reply, the Monolines contradict themselves. They argue that Section 106 only waives sovereign

immunity for actions against the Commonwealth. Aside from the fact that Section 106 includes no such limitations, the dispute is easily resolved by common sense. We, meaning me, should never have engaged the Monolines on sovereign immunity in the first place, as opposed to explaining why it does not apply, which I will now do.

The Puerto Rico statutes and Puerto Rico sovereign immunity protect it from judicial liens against its own property. They are intended to do just that, protect the Commonwealth. Here, the Commonwealth is being given a judicial lien to defeat another creditor's security interest in the Commonwealth's property. The hypothetical judicial lien is not being used to seize the Commonwealth's property. As such, sovereign immunity never even comes into play.

Put differently, the Monolines are asking the Court to deploy sovereign immunity to deprive the Commonwealth of a means to eliminate liens from its own property. That is the reverse of common sense.

The Monolines also argue that *United States v. Security Industrial Bank*, 459 U.S. 70, at page 75, shows it would be unconstitutional to apply Title III retroactively to avoid unperfected security interests in Puerto Rico. But the Puerto Rico Uniform Commercial Code has always provided unperfected security interests are junior to lien creditors. Thus, this is not a retroactivity issue. The Commonwealth

could simply grant someone else a lien and, under old law, that would be senior to the unperfected security interest.

The Monolines argue the Commonwealth's using HTA to part with contract rights to appropriations from the Commonwealth is a transfer subject to PROMESA Section 407. The Monolines' premise is wrong. The Commonwealth has not caused HTA to part with contract rights. Nothing in the record shows the Commonwealth deprived HTA of contract rights. If HTA had contract rights or statutory rights to appropriations from the Commonwealth, it will have an allowed unsecured claim against the Commonwealth per such contract rights.

As a practical matter, however, it may well be that instrumentalities such as HTA do not have rights to enforce appropriations, they are revocable gifts from the Commonwealth. If HTA does have enforceable rights, it will have a claim.

The key point is there was no transfer for Section 407 purposes. Nothing caused HTA to transfer whatever rights it had to appropriations from the Commonwealth. Same for PRIFA and CCDA.

The Monolines argue --

THE COURT: Are you going on from 407 or are you continuing 407?

MR. BIENENSTOCK: I'm continuing on 407.

THE COURT: Okay. At the end of your 407 argument, I'll have a question for you about 407.

MR. BIENENSTOCK: Okay. Thanks, Your Honor.

The Monolines argue PROMESA Section 407 grants them a claim under the first prong of 407 for monies the Commonwealth failed to transfer to HTA, PRIFA and CCDA. The plain words of Section 407's first prong require property of any territorial instrumentality of Puerto Rico, is transferred in violation of applicable law under which any creditor has a valid pledge, pledge of security interest in or lien on such property, end of quote.

The Commonwealth's property is not property of its territorial instrumentality. Here, the Monolines simply disagree with the Court's ruling that the Commonwealth's property has not been transferred to HTA, PRIFA, CCDA or the bondholders.

The Monolines' rationale for ignoring the plain words of Section 407 is that then the Commonwealth's own unlawful conduct, in the form of an unlawful transfer that prevents a security interest from attaching, would immunize itself against liability for that very unlawful conduct. Here again, the Monolines are contending that the Commonwealth's mere default -- it's not transferring money to HTA, PRIFA and CCDA -- gives rise to a cause of action as if there were a transfer and a remedy that requires payment in full. To state their

contention is to refute it, especially when the words of the first prong of Section 407 already refute it.

The Monolines argue the second prong of Section 407 reads to the matter it does not read. Monolines contend the second prong of 407(a) reads, while the Oversight Board for Puerto Rico is in existence, if a violation of applicable law, words they insert, deprives any -- skipping some words -- territorial instrumentality of property in violation of applicable law, assuring the transfer of such property to such territorial instrumentality for the benefit of its creditors, then the transferee shall be liable for the value of such property, end of quote.

The Monolines, however, simply misstate what the second prong of Section 407 says. It says, "while an Oversight Board for Puerto Rico is in existence, if any property of any territorial instrumentality of Puerto Rico is transferred in violation of applicable law which deprives any such territorial instrumentality of property in violation of applicable law showing the transfer of such property to such territorial instrumentality for the benefit of its creditors, then the transferee shall be liable for the value of such property."

In short, the second prong of Section 407 protects territorial instrumentalities and their creditors of wrongful clawback. It protects them from getting the money and then

losing it due to wrongful clawback. But if they don't get it in the first place, they can't transfer it, and there's no cause of action under the second prong of Section 407.

The fallacy of the Monolines' reading of the second prong of Section 407 is that, again, the Monolines interpret the Commonwealth's simple failure to pay as a wrongful transfer. What is clear is that a failure to pay may be a default, but it's certainly not a transfer.

The Monolines point to House Report No. 114-602 in year 2016 to argue that Section 407 applies to transferred property creditors have or would have a pledge of or security interest in. That argument fails for three reasons. First, the "would have" language is contrary to the plain meaning of the statute, which does not include the "would have" language. There is no ambiguity in the statute justifying following a deviation in the legislative history.

Second, the legislative history does not help the Monolines. They ignored that the legislative history they cite restricts itself to transfers of property between instrumentalities. The Monolines are not complaining about any transfers between instrumentalities. They complain about the lack of a transfer from the Commonwealth to HTA, PRIFA and CCDA.

So the Monolines are asking the Court to take a sentence from the legislative history and, A, disregard the

first part about the transfers being between instrumentalities, while, B, crediting the second part, using the words "would have," which are nowhere found in the statute.

Third, our prior point about the legislative history cited by the Monolines being entitled to no weight because it is inconsistent with the plain words of the statute is corroborated by Congressman Grijalva's comments in the Congressional Record, which the Monolines should have cited but did not. Congressman Grijalva explained the following in the June 9, 2016, Congressional Record at pages H3601-H3602. I'll only quote a short part.

"But the addition of the language 'or would have' in the Committee Report again reflects staff level text that was not ultimately included in the version approved by the Committee. The current text provides a cause of action for creditors that, at the time of the alleged unlawful transfer, in fact, had a pledge of, security interest in or lien on the transferred property. Contrary to the suggestion of the Committee Report, the provision does not permit such a cause of action if the plaintiff only would have, in some future circumstances, such an interest.

Indeed, the fact that the addition of the words like 'or would have' were discussed, but not ultimately included in the text, is strong evidence that Congress did not intend for

such perspective contingent rights to be within the scope of this provision. It would have been extraordinary to provide certain creditors an argument that federal law establishes for them a property interest where no such property interest existed under the terms of the agreements they negotiated. The Committee rightly declined to do so."

Monolines also argue that PROMESA Section 407 claims are nondischargeable, because they are enforceable after stays are no longer in effect. Bankruptcy courts frequently terminate a stay to allow a creditor to liquidate its claim in another court. That doesn't mean the claim escapes discharge. Bankruptcy Code Sections 944(b) and (c) make clear all claims are dischargeable.

Your Honor, that was the end of my Section 407 discussion.

THE COURT: Thank you. And I just want to come back to 407(b). The 407 claim is not one that would be enforceable until after the Stay is no longer in effect. And so in seeking to strike the 407(b) claim now, are you seeking to have me determine that there is -- the 407 claim, no possible factual predicate for that claim ever, so that it would never arise to be enforceable, and it should be dealt with now, even though it's a claim that can't be brought now, continued or something like that?

MR. BIENENSTOCK: Not entirely. What we're asking

for is -- the Monolines filed their Proofs of Claim, and they included in those certain 407 claims. We are addressing the 407 claims they raised, and those are the 407 claims we're asking the Court to rule on for the reasons we've provided.

And I guess implicitly, Your Honor, that would mean that Your Honor is modifying the Stay to allow for the current determination of the 407 claims asserted by the bondholders -- or by the Monolines.

THE COURT: Thank you.

MR. BIENENSTOCK: The Monolines contend the invalidity of fiscal plans and budgets is a material, disputed fact preventing summary judgment. First, the fiscal plans form a blueprint between the Oversight Board and the Governor, and the fiscal plans are not self-operative. They tell the government what the Board wants it to do. The budgets authorize spending. To the extent the Monolines have what they call constitutional claims impacted by that spending, nothing has prevented the Monolines from suing for Stay relief or other remedies. They have already done so numerous times.

If, for instance, the Commonwealth determines the budget is spending the Monolines' cash collateral, the Court could grant Stay relief if the Commonwealth does not provide adequate protection. None of this impacts the allowability of the Monolines' claims at issue here.

Moreover, we now know the Monolines do not have

secured claims, other than for certain monies in the accounts the Court identified in its Stay Relief Opinions. Now, however, it is clear the Monolines' collateral is restricted to those funds inside certain accounts. The Monolines do not agree, but unless the Court changes its mind, they have no Takings claims.

The only other constitutional claims are Contract Clause claims. For those, the Monolines must show state or territorial legislation impairing contractual obligation. The Monolines allege the budgets are territorial legislation, but the budgets are neither territorial legislation, nor do they create Contract Clause claims.

PROMESA puts the Oversight Board in charge of budgets and preempts Commonwealth law providing for budget expenditures. That is federal law. It's been held by this Court and affirmed by the First Circuit.

The Contract Clause provides, no state shall pass any law impairing the obligation of contracts. The Commonwealth doesn't pass the budget. PROMESA deems the budget approved without the Commonwealth passing it. The budget is not Commonwealth legislation because it is created by the Oversight Board and PROMESA, federal law -- and PROMESA, federal law, deems it approved by the Governor and the legislature.

THE COURT: Mr. Bienenstock, I --

MR. BIENENSTOCK: The Monolines contend PROMESA Section --

THE COURT: I have a question for you about the deemed approval and the relationship to legislation. Puerto Rico is a political entity that has a structure. It has to act by various components of its structure. PROMESA put the Oversight Board into its structure, but through this provision that a budget approval by the Oversight Board is deemed to be approved by the legislature, hasn't Congress put the Oversight Board into the position of doing a legislative act for this particular limited purpose?

The statute doesn't just say the Oversight Board's budget is the law. It says the Oversight budget is deemed to have satisfied the ordinary structural requirements of Puerto Rico law.

MR. BIENENSTOCK: Your Honor, this is, I guess, a chicken and egg issue in that our point is that it's PROMESA, federal law, that adopts the budget, and it imposes it on the local legislature.

THE COURT: Thank you.

MR. BIENENSTOCK: And, you know, that's what Section 202 does. It's federal law, deems the budget approved. It's -- Congress has done that.

And for the other -- I want to go on, but even if the Court were to treat the budget as non-federal law, as

territorial law, for all the other reasons we've given, there's still no Contract Clause violation. The budget only authorizes expenditures.

The Monolines contend that PROMESA Section 303(3) negates the preemption of the Puerto Rico statutes requiring appropriations to HTA, PRIFA and CCDA. By its terms, Section 303(3) preempts unlawful executive orders, diverting funds from one territorial instrumentality to another or to the Commonwealth.

Thus, the words of Section 303(3) show the Monolines are wrong for two reasons. First, only unlawful executive orders diverting funds are preempted. In other words, executive orders carrying out a certified budget would not be illegal. Second, Section 303's carve-out of unlawful executive orders, while not carving out certified budgets and plans of adjustment, show Section 303(3) was solely intended to and restricted to bar territories from engaging in their own debt restructurings involving interdebtor transfers outside of PROMESA in Titles III and VI.

And to the Monolines' point that PROMESA encourages voluntary restructurings under Title VI and so Title III shouldn't even be considered, the simple answer is Title VI doesn't even allow for relief to restructure pension plans, of which the Commonwealth has 55 billion dollars, automatic stay and other relief. So clearly, PROMESA in no way suggests that

Title III is disfavored in favor of Title VI.

The Monolines argue the Excise Tax Statutes are not impliedly preempted. Starting in 1800 -- I'm sorry, Your Honor. I covered that already.

The Monolines argue that *Maine Community Health v. United States*, at 140 S. Ct. 1308, shows the existence of an obligation is not defeated by the absence of an appropriation. The Commonwealth takes no issue with that proposition. Whatever obligation the Commonwealth had is not eliminated by the Oversight Board's Certified Budget's failure to appropriate money to pay such obligations.

The Oversight Board has never argued that its failure to budget payments of an obligation eliminates the obligation. And, Your Honor, this is yet another -- it's an example of why the budget, even if Your Honor treats it as territorial legislation, is not the cause of any impairment of obligations of contract. If the budget doesn't pay something, that doesn't eliminate the obligation of the contract that it be paid and doesn't eliminate the Monolines' rights to file proofs of claim, which they have.

The Monolines, however, cite *Maine Community* for a proposition that it does not support. Namely, that the pre-PROMESA and pre-Title III appropriation statutes, such as the Excise Tax Statutes, are not preempted by PROMESA and Title III and are specifically enforceable and

nondischargeable. *Maine Community* says nothing about whether PROMESA Sections Four, 108(a)(2), 202 and 207 in Title III preempt Excise Tax Statutes or render them specifically enforceable and nondischargeable.

I want to emphasize on this point, the Monolines today and in prior hearings frequently cite Supreme Court and other decisions where failures to make appropriations are met with orders requiring the appropriations or the payment. And that doesn't demonstrate that here, in Title III, the Monolines are entitled to specific informance -- or nondischargeability. All it demonstrates is that in all the cases they've cited, including the ones at issue today, they're outside of bankruptcy where the parties can, if they have to, satisfy all obligations.

They also cite a 1892 case of *Ferris*. *Ferris* provides, at page 546, "an appropriation per se merely imposes limitations upon the government's own agents. It is a definite amount of money entrusted to them for distribution, but its insufficiency does not pay the government's debts, nor cancel its obligations, nor defeat the rights of other parties."

We agree with that wholeheartedly. Our budget's failure to pay, for instance --

(Sound played.)

MR. BIENENSTOCK: -- an appropriation to HTA or PRIFA

doesn't eliminate any rights. It just -- it's not paid. And those contractual obligations survive and can be the subject of proofs of claim.

Finally, the Monolines contend they are secured in the Commonwealth -- oh, I covered the bank account issue already.

So, Your Honor, I think I might have a few extra minutes, and unless the Court has further questions, I would give those to my colleagues.

THE COURT: Fine. So there's a minute and a half that will go to your -- the people who will speak after the UCC? Is that what you want?

MR. BIENENSTOCK: Yes, please, Your Honor.

THE COURT: Very well, then. Thank you very much, Mr. Bienenstock.

And I will now call on counsel for the UCC. Is that Mr. Despins or Mr. Zwillinger?

MR. DESPINS: It's Luc Despins, Your Honor. Good morning, Your Honor.

THE COURT: Good morning, Mr. Despins.

MR. DESPINS: So Your Honor, for the record, Luc Despins with Paul Hastings on behalf of the Official Creditors Committee.

As Your Honor knows, we filed the very specific joinder in two portions of the Oversight Board's Motion and

Supporting Memorandum. And so we understand that today we have a very limited supporting role, and, therefore, we will not -- probably not use all the time allocated to us in the opening section.

Most of the issues have already been covered by Mr. Bienenstock. We just want to emphasize two issues, Your Honor. The first one is emphasis on the Oversight Board's Title III preemption argument, which is contained in paragraph 97 of Docket No. 56, filed on April 28. And, basically, that's where the Oversight Board takes the position that the argument that the statutes entitle the bondholders or others to priority are preempted by Title III.

The point we want to make is that in the Response, the Monolines and others argue that it cannot be that it was automatic preemption, because Title III was never a sure thing. It was a potential filing, but never a sure thing. And therefore, there could not be automatic prevention -- preemption. I'm sorry.

And obviously we are now in Title III, so we're not sure where that argument gets them. But more importantly, the attempt to distinguish the cases cited by the Oversight Board, such as *Detroit*, et cetera -- but in doing so, it's very clear that they offer no cases. Not one case ever cited for the proposition that state law or territorial law priorities are enforceable in any bankruptcy context, Chapter 11, Chapter

Nine, or obviously PROMESA. And we believe that these are, you know, compelling points.

Also, we wanted to emphasize the argument that their constitutional claims are mere pre-petition unsecured claims, but you've already practically ruled on that in your September 9th Order, so we're not going to repeat that. And therefore, we would assign any remaining time in our time to Mr. Firestein to the extent he needs it, Your Honor. Thank you.

THE COURT: Thank you. I think there's seven minutes and ten seconds left. Thank you very much, Mr. Despins.

So now I will turn to Mr. Firestein.

MR. FIRESTEIN: Good morning, Your Honor. Can you hear me?

THE COURT: Yes, I can.

MR. FIRESTEIN: Excellent. Thank you, Your Honor. Michael Firestein of Proskauer on behalf of the debtor, the Commonwealth and the moving parties.

I know you heard the substantive arguments from Mr. Bienenstock regarding the claims at issue, and some of that spilled over into what is relevant and, more importantly, not relevant in terms of what presents or couldn't present a triable issue of material fact. And I agree with Mr. Bienenstock, the defendants' views of what could be a triable issue does not move the needle in terms of the

propriety of granting summary judgment on the claims at issue.

My purpose, along with Mr. Kass, is to discuss certain Rule 56(d) issues and their lack of impact here. I won't bury the lead. We do not believe the alternative relief sought under 56(d) is well taken, or should prevent or defer entry of partial summary judgment in favor of the Commonwealth on the relevant claims.

Let me begin with what 56(d) is and is not. Rule 56(d) asks only whether defendants have had an adequate opportunity to demonstrate if there are disputed issues of fact. What this means is only if defendants can show they've been denied the opportunity to present a material disputed fact to an absence of ability to seek discovery, and such facts are truly material to the issues presented, would Rule 56(d) be relevant.

This is a tall hurdle given everything that has happened in recent motion practice and the prior findings of the Court. Indeed, defendants spared no argument from being exhaustively briefed in their oppositions, in my mind, persuasively pointing to the conclusion that any further discovery would be duplicative or cumulative, if material at all.

The simple truth is the defendants do not need additional discovery to respond to the motions, despite the number of issues they attempt to raise. The material issues

necessary to these motions remain, and always have been, issues of law grounded in relevant statutes, the undisputed bond documents, and immutable facts. Indeed, the same undisputed record that has been before the Court on prior occasions, particularly within the claims --

THE COURT: I'm sorry.

MR. FIRESTEIN: Yes, Your Honor.

THE COURT: I'm sorry to interrupt your overview, but you mentioned issues of law that are based on undisputed sets of documents. With respect to PRIFA, the defendants have argued that there are documents that are -- that the trust documents that have been produced don't seem to be complete, and they refer to what they think are some missing supplemental agreements. And they are looking for discovery to complete their reference set in aid of determining the document-based arguments with respect to PRIFA.

What is your position as to that particular 56(d) request?

MR. FIRESTEIN: I think that that's a makeweight argument. This is the same Trust Agreement, Your Honor, that they used in connection with the Lift Stay. And to now suggest that perhaps the document upon which they were relying at that time is now not the document that they think it is, I think is not a basis upon which to deny summary judgment. And, in fact, it's the source of the rights that they claim,

or one of the sources of the rights that they claim that they have.

So if we're in a world in which the Trust Agreement is not authentic or otherwise applicable, it's difficult to see how they would withstand summary judgment in any event.

THE COURT: Thank you.

MR. FIRESTEIN: Bluntly, Your Honor, defendants have not identified proper subjects for which discovery will matter. Instead, what they do is try to convince the Court that certain subjects are relevant, but they're not.

In any event, defendants' effort is procedurally barred. Part of the standard in this Circuit is diligence. If you don't act diligently, you can't satisfy Rule 56(d). Regardless of posturing, defendants simply did not act in that way. They were not denied an opportunity to take discovery or precluded from doing so. They simply didn't do it, a fact that they don't contest. Instead, they endeavor to provide excuses for having done so.

That failing even to pursue discovery in advance of the months that they had to prepare their oppositions points to the absence of the need for it, particularly given the hundreds of pages of briefing they submitted in opposition regarding every conceivable argument, many of which have been previously decided by this Court and alluded to by Mr. Bienenstock.

Now, I know the Court has considered the substantial briefing on the issues, including 56(d), but I want to highlight several specific items in defendants' recent submissions. They claim the process we use to address 56(d) was procedurally improper. That's wrong and results form over substance. Their 56(d) applications were chock-full of legal authorities and merited a comprehensive response. It was not just declarations. Indeed, a 56(d) request should be treated as any other motion and responded to in kind.

There was no reasonable basis for the Court to avoid the issue on this process point. It's no different than an in limine or *Daubert* type motion that could be utilized in a Rule 56 summary judgment motion. This argument should be disregarded because it's wrong. And importantly, I know the Court desires to get to the merits of the gating issues.

Defendants also claim we are somehow objecting to the timeliness of their filing. This is also wrong. The Commonwealth's argument is that they should have sought discovery long before the filing of the 56(d) in order to satisfy the controlling First Circuit standard. That's the timeliness, diligence point I made earlier. And on that, again, they don't dispute the facts.

These defendants have never hesitated to pursue discovery when they feel they need it, except here, and that purposeful tactic should not be rewarded. It wouldn't have

violated the Stay, and certainly not to at least ask to do it. Moving to lift the Stay for all kinds of things is a common practice in these Title III cases, something defendants have done repeatedly. They certainly weren't precluded from doing so, and frankly, they knew exactly how to ask for discovery, which they did, in fact, seek relative to the use of the Lift Stay discovery, in the context of summary judgment, to which we consented. This argument is not well-founded. They cannot be allowed to benefit by purposely sitting on their hands.

They also claim in their Response they couldn't or shouldn't be required to identify the specific facts they seek, and they can be more general about the issues in question. That's contrary to First Circuit law. In the *Resolution Trust* case, the Court clearly notes, discovery sought under Rule 56(d) is not "ordinary," and is more restrictive than what is generally allowed under the Federal Rules.

And the *Bad Paper* case, one of my favorite case titles, from the District of New Hampshire, indeed required the parties seeking relief to "identify the specific facts they seek or explain how the information sought would suffice to defeat summary judgment." They didn't do that here. We discussed that at length in our submission. And that does not satisfy the standard under 56(d).

But I do want to give a few illustrations of what

they claim in their recent Response and why those issues don't matter to the motions at hand. While not exhaustive, it's illustrative of defendants' ill-conceived approach to Rule 56(d). Focusing on HTA, the defendants contend that the Commonwealth's budgeting process and the certification of the same by the FOMB supposedly raises factual issues they want to pursue. It does not.

As Mr. Bienenstock noted, and we have pointed time and again, this Court has repeatedly decided that 106(e) precludes review of the budget certification decisions, including whether the Fiscal Plan complies with Section 201. No discovery on this issue is going to move the needle on summary judgment, and it isn't allowed here, a position made clear as well in our Response to the separate statement claims that they make.

Similarly, defendants claim they need to take discovery into the reasoning behind the default by the Commonwealth and its failure to remit the allocable revenues to, in this case, HTA, but equally applicable to PRIFA or, frankly, CCDA. But the reason for the default is of no moment to this motion. The question is whether there's a legal consequence for having done so, not that it occurred.

We say there's no consequence because they have no secured status on the retained money in question. So the reason for the retention is immaterial to the issues

presented. And this is a legal issue flushed out in the briefs for which no discovery would benefit the evaluation.

To be clear, why some government employee may have determined to retain the monies is not germane to the legal issues presented on the nature, if any, of their liens. The question is whether it having been done has a legal consequence. We submit it does not.

Likewise, defendants claim that the mere issue of clawback, or the propriety of same, or its trigger is not legal in nature but requires considerable fact discovery. It does not, as argued in the briefing.

This issue principally relates to the Contract Clause, but none of the discovery claimed will, for example, alter the legal issue that, one, PROMESA caused the impairment, if any, in the contracts to which defendants are parties between HTA, for example, and the defendants; or two, that the available resources for the Commonwealth were sufficient to pay the billions of dollars of debt owed on the Commonwealth's GO burden.

And a moment of digression, Your Honor, regarding the Court's comments concerning the nature of the motion that's been filed and manner in which the Contract Clause claims have been challenged. You inquired of Mr. Bienenstock as to whether the issue of "reasonable and necessary" was a part of the motion. Mr. Bienenstock's response was that it was

implicit within the claims. Whether it is or not implicit, it's not necessary to assess the issues that are capable of resolving these matters at summary judgment.

The fact is that, in the briefing that we've submitted in connection with these matters, there are separate and independent legal grounds upon which the Court can disallow the Contract claims in their entirety, as I've noticed -- as I've indicated.

THE COURT: And so you're saying that --

MR. FIRESTEIN: And for the same reasons -- yes, Your Honor?

THE COURT: Are you saying that I can disallow the Contract Clause claims without reaching the clawback issue or the question of whether there is a factual predicate for the assertion that the clawback has been triggered?

MR. FIRESTEIN: Yes. Yes. And to be more fulsome in connection with that, that is exactly the point that was made in the briefing.

Indeed, one functional and independent ground is if -- even if the Court were to consider that there was an impairment, something with which we disagree, but if there was to be a finding of any kind of impairment, our view under the law is that that impairment would have been caused by PROMESA for the reasons that have been articulated by Mr. Bienenstock. And as a federal law, it is not subject to scrutiny under the

Contract Clause. So without regard for anything else, that would be a basis upon which to disallow the Contract Clause claims.

THE COURT: And even --

MR. FIRESTEIN: And -- yes, Your Honor.

THE COURT: -- as to CCDA, there wouldn't be a necessity to reach the clawback issue?

MR. FIRESTEIN: So CCDA, Your Honor, I'm going to yield to my partner, Mr. Kass, who's going to address, I believe, that exact issue and how it applies relative to CCDA. I expect that he will address that head on.

THE COURT: Thank you.

MR. FIRESTEIN: But let me just conclude that for similar reasons, Your Honor, this Court has already ruled, another area in which they seem to suggest a need to procure discovery into accounting practices or government decisions on the flow of funds, I submit, Your Honor, that does not impact the legal determination presented here about whether defendants have secured claims based on official documents, resolutions, or statutes.

Those are the issues, and accounting practices do not affect them for the exact reasons that the Court identified in the preliminary ruling. And I believe this was specifically included in the PRIFA preliminary ruling, but certainly has larger application.

The simple point is that throwing up dust about issues of interest to defendants does not mean that if discovery were permitted, it would shed material light on whether, with respect to the revenues retained by the Commonwealth, there was a statutory lien, a security interest, much less a perfected one, ownership or trust interest in favor of defendants, or a defense to the 407 claims or the Contract Clause claims. That's what's at issue here.

Fundamentally, without that materiality link, the academic inquiries posed have no effect on the pending Summary Judgment Motions. Accordingly, Your Honor, the 56(d) request should be denied and summary judgment granted on the claims in question for each defendant.

Now, as Your Honor asked regarding the CCDA issues, I'm going to, if I can, Your Honor, yield the rest of the time to my partner, Mr. Kass, who will make some observations on that and a few related matters, unless the Court has any questions.

THE COURT: No. That's fine. Thank you very much, Mr. Firestein.

MR. KASS: Good morning, Your Honor. Colin Kass for the Oversight Board.

THE COURT: Good morning.

MR. KASS: Good morning.

Following up on what Mr. Firestein just said, I'd

like to address a few points specific to CCDA. As an initial matter, it is important to focus on what defendants claim they need additional discovery for and what they do not. In their 56(d) Declaration, they do not claim they need any additional discovery for their statutory lien claim, their ownership claim, their express statutory or constructive trust claims, or on the issue of perfection. Rule 56(d), therefore, cannot prevent the grant of summary judgment as to those claims.

Defendants' only response to this is that they have not yet filed an answer or counterclaim, but there is nothing in Rule 56(d) or elsewhere that renders the filing of an answer or counterclaim relevant. A counterclaim, by definition, relates to claims other than the ones at issue in our Motion. And if their 56(d) Declaration cannot show that discovery is essential to decide our Motion, an answer will not fill that gap.

Now, with respect to the claims for which they say they do need additional discovery, those arguments are meritless. First, they say they need additional discovery as to the identity of the transfer account. This issue goes primarily to the existence and scope of a security interest. But as we explained in our Reply papers, we agree that the identity of the transfer account is a triable issue. We are, therefore, not seeking summary judgment disallowing a claimed security interest as to funds that had been deposited into

what is ultimately determined to be the transfer account.

That fact, however, does not preclude the grant of partial summary judgment on defendants' security interest claims, particularly for funds that defendants claim should have been but were not deposited into the transfer account. As such, discovery concerning the identity of the transfer account is not essential to determine partial summary judgment on the Commonwealth -- in the Commonwealth's favor.

Second, defendants claim that they need discovery for purposes of their Section 407 claim, but they concede that the vast bulk of the funds at issue, over a hundred million dollars, have been segregated in the FirstBank account. And so there is no transfer to the Commonwealth. No discovery is necessary under Rule 56(d) to grant partial summary judgment as to those funds.

THE COURT: They do claim that there was some transfer back to the Commonwealth, don't they? In CCDA, there is some noise about some amounts of actual transfers?

MR. KASS: Correct, and I'm about to address that.

THE COURT: Thank you.

MR. KASS: So defendants identify a single post-PROMESA transfer of 15 million dollars, and they say discovery may show additional post-PROMESA transfers to the Commonwealth. Now, as to the need for discovery, defendants already have all the relevant post-PROMESA account statements

from the relevant accounts, and they have not identified any additional transfers to the Commonwealth. So their request for Rule 56 discovery relating to funds other than the 15 million dollar transfer rests on sheer speculation --

(Sound played.)

MR. KASS: -- and should be denied.

Now, as to the 15 million dollar transfer, there are many reasons why the Court can and should grant summary judgment as a matter of law. Most importantly, as this Court held in the Lift Stay proceedings, the occupancy taxes are the property of the Commonwealth, and the Commonwealth has never relinquished its ownership of these funds to the transfer -- to the Tourism Company. So there is no deprivation of an instrumentality's property.

To the extent the Court decides a Section 407 claim on this basis, again, Rule 56(d) discovery is simply unnecessary, and defendants do not argue otherwise. Now, if the Court goes beyond that, then the Section 407 claim fails both for preemption and because of the clawback under Article VI, Section Eight. Those issues were largely addressed by Mr. Bienenstock and Mr. Firestein, but with respect to the Court's specific question on the clawback issue, the defendants' argument is based on a faulty premise of law.

The triggering event under the Constitution is that appropriations exceed available resources. That is the only

issue that is necessary for the Court to determine, and that can be determined on undisputed facts. The last dollar defense that they have is statutory in nature and cannot override the constitutional provision. And so facts relating to the last dollar defense, which is what the defendants are seeking as part of their Rule 56(d) Motion, is simply irrelevant.

For that reason, defendants cannot show on the existing record that additional discovery is essential to deciding the Commonwealth's Summary Judgment Motion, and for that reason, the request should be denied.

Thank you, Your Honor.

THE COURT: And is your argument that it's undisputed as a matter of fact that appropriations exceed available resources dependent on, first, taking the Congressional finding as an evidentiary fact, and second, assuming that the entire outstanding GO obligation was accelerated, that there is a 17 billion dollar figure implicit in the appropriations test for each and every year?

MR. KASS: Your Honor, I think our position -- so the answer to the question is yes, that is true. I don't know that it is dependant on the finding of acceleration. If the Court concludes that acceleration is appropriate, then there's no question, and even the defendants would agree that appropriations exceed available resources. But even if that

is not the case, the fact that the GO debtholders are not being paid, and have not been paid in full, is evidence that they -- is undisputed evidence that appropriations cannot exceed -- that appropriations exceed available resources.

THE COURT: Thank you.

So did the two beeps beep? I think --

MR. KASS: I heard --

(Sound played.)

THE COURT: Oh, now they have. I'm sorry. Had I prevented you from making a last point, if you have one?

MR. KASS: You did not, Your Honor. I think that completed my discussion.

THE COURT: All right. Thank you very much, Mr. Kass.

So this concludes the arguments in support -- the opening arguments in support of the Motion. We will now take a 12-minute break. And so I would ask that everyone hang up, and then call back in at 10:55. And then we will proceed with the arguments of the objecting parties in opposition.

Thank you. Talk to you shortly. We're adjourned.

(At 10:43 AM, recess taken.)

(At 11:03 AM, proceedings reconvened.)

THE COURT: Good morning. This is Judge Swain.

MS. NG: Good morning, Judge. It's Lisa.

THE COURT: Very well. I'm ready to continue hearing

the arguments, and next up is Mr. Natbony, who is allotted 40 minutes for Assured.

MR. NATBONY: Thank you, Your Honor. Can you hear me?

THE COURT: Yes, I can. Good morning.

MR. NATBONY: Thank you. Good morning, Your Honor. May it please the Court. William Natbony from Cadwalader, Wickersham & Taft, LLP, speaking this morning on behalf of the Monoline Defendants.

And first, Your Honor, I certainly hope that all counsel, Your Honor, and the court staff are doing well and staying safe during these unusual times.

THE COURT: Thank you. And that is my hope for everyone as well.

MR. NATBONY: So, Your Honor, plaintiff's motions before the Court relate to a limited number of similar causes of action asserted against each Monoline Defendant and the Trustee. I will be addressing generally the application and procedural issues pertaining to Rule 56(d), the existence of issues of material fact as relates to the HTA bonds. Towards that end, like the Board, it is not our intention to argue issues of law already decided by the Court in the Lift Stay Motions, though we respectfully disagree with a number of those rulings and are moving forward with appeals.

After me, Ms. Miller will then address Section 407,

preemption, and the existence of factual issues for PRIFA and CCDA. And Mr. Berezin will then address plaintiff's claims concerning the Contract Clause causes of action.

Your Honor, plaintiff's motion essentially depends upon two flawed premises. First, plaintiff argues that the Court's prior Lift Stay decisions require the extreme and extraordinary relief of summary judgment here. And second, plaintiff contorts the purpose and requirements of Rule 56(d) in a manner wholly inconsistent with applicable law. I will address each flaw in turn and attempt to address a number of the arguments that Mr. Bienenstock made for the first time in his argument.

The plaintiff asserts, Your Honor, that summary judgment is appropriate for certain counts because Your Honor's prior Lift Stay decision concerning the existence of property issues and interests controls here and prevents the existence of material issues of fact. We disagree.

The parties have extensively briefed the issues surrounding construction and interpretation of the Excise Tax Statutes and the existence of a trust relationship, and we believe there is ambiguity and a need for discovery. But Your Honor has expressed a prior view on these issues, and although we respectfully disagree, we are going to rely on the briefs for them. But both this Court and the Board do agree that defendants, in fact, have a security interest in excise taxes

that actually reach the Fiscal Agent account. And the Board admits as much, and admits specifically that the 2002 security agreement which applies to all funds, quote, required to be on deposit, not only deposit -- and other documentation create that security interest. But if monies had been in the Fiscal Agent accounts or should have been, nothing in the Court's prior decision is inconsistent with a finding that defendants have security interests. So in a sense, even under the Court's prior rulings, the issue is really the size of our secured claim measured by the quantity of excise taxes that reach the Fiscal Agent accounts, and not whether we have a secured claim.

The Court's Lift Stay decisions, at least with respect to HTA and PRIFA, are premised on the fact that no excise taxes reached the Fiscal Agent accounts, and therefore, the Commonwealth, rather than the HTA, had control over those taxes. But the real question here is why did the funds not reach those accounts? And as we demonstrate in the briefing, the concept of control requires more than physical possession. It requires lawful domination and control.

Now, plaintiff says that the reason excise taxes are not reaching the Fiscal Agent accounts is because the Commonwealth is breaching the excise taxes and has a right to do so. Well, if the Commonwealth was not permitted to breach the excise taxes -- Excise Tax Statutes, then the flow of

funds into the Fiscal Agent accounts must resume and the size of our secured claim necessarily increases.

So the issues of why such breach is occurring and what is the Commonwealth's rationale for the breach remain issues that must be eventually decided by this Court on a full record and are issues that raise genuine issues of fact. Indeed, the validity of the underlying rationale to the admitted breaches remains very much in dispute.

The Board has been all over the place as to why, you know, the funds are not getting to the account. They do introduce a new theory in their Reply that the Commonwealth doesn't have to comply with the Excise Tax Statutes because of a right to default or a determination to breach. Of course, that argument by its nature admits that the Commonwealth has defaulted or breached an obligation. But this new basis replaces the original one, which was advanced in the Summary Judgment Motion, which was that the Moratorium Orders, laws, orders, fiscal plans and budgets caused the Commonwealth not to comply. But as we established in the opposition, debtors must comply with all valid state and territorial laws.

The Board refutes -- now we did --

THE COURT: So Mr. Natbony, are you arguing that if there is a law on the books, notwithstanding bankruptcy, the beneficiary of that law is entitled to specific performance under all circumstances?

MR. NATBONY: Our position would be that the statute that requires that, they do have an obligation to comply with state law. And the fact of the matter is that the government's reliance on *Kovacs*, which they cite for the proposition that statutory obligations basically can be discharged, doesn't really say what it says. And that's their reliance on the point that Your Honor is raising.

So Mr. Bienenstock, for instance, argued that the Commonwealth's ongoing obligation, you know, is equivalent to the money judgment at issue in *Kovacs*, because the Excise Tax Statutes could be enforced by court order. But *Kovacs* is clearly distinguishable. In *Kovacs*, certain statutory obligations had already been reduced to a monetary judgment pre-petition, so it was that pre-petition money judgment, not the statutory obligations themselves, that the Court found to give rise to a right of payment constituting a claim under the Bankruptcy Code.

And the Court specifically emphasized that, aside from this pre-petition money judgment, the debtor was otherwise required to comply with statutory obligations going forward, including in the post-petition period. That's the situation here. Here, unlike in *Kovacs*, there is no pre-petition money judgment. There is just the Excise Tax Statutes themselves, which the Commonwealth must comply with.

Moreover, as already argued in paragraph four of our

Sur-Reply, if defendants did obtain a court order to enforce the Excise Tax Statutes, that order would not be a money judgment requiring the Commonwealth to pay a debt. It would be a writ of mandamus specifically enforcing the Commonwealth's ministerial, nondiscretionary obligation to transfer the taxes to HTA for the benefit of the bondholders.

Now, also --

THE COURT: Just one moment.

MR. NATBONY: Yes, Your Honor.

THE COURT: If the Board is right on the law, and you're saying they're not, but if the Board is correct on the law regarding the ability, I suppose, not to comply with the statute, then the issues of exactly how and why that came about would not be material. But you're saying that they have to comply, and if they have to comply, then why are the issues of why they haven't complied material?

MR. NATBONY: Yes. A few --

THE COURT: It's hard for me to see why that's --

MR. NATBONY: A few points, Your Honor. First of all, as I said, the entire rationale of why they're not complying is an issue in and of itself. I mean, you know, first they talk about they just have a right to default. They also say that they have, you know, a power to reject, you know, and that is what they basically say in their papers. But again, statutory obligations are not mere context that can

be rejected.

But there really is no evidence in this record that the Commonwealth is failing to comply really because of some abstract rights of default or breach. In fact, the record evidence that is before Your Honor shows that the Commonwealth is not relying on some amorphous right to default or breach, but in fact, because of the moratorium laws and orders.

And I would refer you to Exhibit 55 to my Declaration, which is a Commonwealth Treasury spreadsheet, which details revenues that were withheld under the Moratorium Act and related executive orders, and they list by credit, whether it be the various excise taxes under those provisions -- so if the right to breach is the Commonwealth's justification, at minimum, there is a genuine issue of fact that needs to be explored and resolved.

We need to know what the true purported justification of the Commonwealth is, and who is going to tell us that, and how it was determined, so that we can literally test it.

THE COURT: The Commonwealth is saying that if there's a breach, whatever reason there is for the breach, your clients still have their contract claim against HTA; HTA has whatever claim it may have against the Commonwealth, if that survives; maybe you have a claim under the nonimpairment covenant against the Commonwealth; but none of those, as a matter of law, is a claim that supports a requirement of

specific performance in the absence of ownership interest in these funds.

And so if they are right on that view of the law, and I recognize that's a big if and you are and will be arguing the law, but if they're right on that view of the law, then yes, it would be interesting to know why. And yes, it might make them, you know, look worse in some way that may be material down the line somewhere else, but why is that a genuine issue of material fact in connection with this summary judgment motion practice?

MR. NATBONY: Again, a few points, Your Honor. First, to the extent that there is a lack of justification to withhold, whatever the reason be, whether it be the breach, whether it be the Moratorium Orders, whether it be the budgets, whether it be, you know, some purported clawback right that justifies retention, the bottom line here is that if those justifications are without basis, then the money needed to be transferred. And HTA would have had control, and the amount of our secured claim would essentially rot.

So even under Your Honor's Lift Stay decision that limited the security interest to those monies that would be in the Fiscal Agent account, if there is no justification for lawful control and lawful possession under any of these theories, then the amount of our secured interest goes up because the amount that would be in the fiscal accounts

necessarily as a matter of law would have had to have been transferred to those accounts.

And, of course, Your Honor, I recognize that in addition, we respectfully disagree with the overall property interest reasoning set forth there. So if that were to change, that would impact things here as well.

THE COURT: Thank you.

MR. NATBONY: So just as far as the extent the Oversight Board claims that its Fiscal Plans or Budgets, rather than the moratorium laws, are the cause of the failure, again, there's no evidence of that in the record. If fiscal plans or budgets did have the effect of impairing defendants' bond in this manner, then in theory, the amount of our secured claim would go up, and the fiscal plans and budgets would likewise violate the Contract Clause, as Mr. Berezin will address.

And I should also note that the Fiscal Plans and Budgets are also void even under PROMESA, because before developing or certifying a plan or budget, the Oversight Board was required to conduct an analysis of mandatory factors enumerated in Section 201 of PROMESA. And here, the record evidence shows the Oversight Board did not perform that analysis. In fact, the Board did not define essential public services, which would have been necessary in order to determine whether a fiscal plan ensures the funding of

essential public services as required under Section 201.

Now, plaintiff does rely on PROMESA Section 106(e) to assert that defendants could not challenge a certification determination of a fiscal plan or budget, but, however, a certification determination as such term is used in Section 106(e) means a determination that the Fiscal Plan or Budget satisfies the mandatory Section 201 factors.

Since the Board never performed the Section 201 analysis, there is no certification determination to challenge and Section 106(e) doesn't apply. To the extent plaintiff relies on a clawback theory under Article VI, Section Eight, to justify its retention, material issues of fact do exist concerning whether any clawback was justified. The Commonwealth's alleged clawback is dependent on an analysis under Article VI, Section Eight, that budget appropriations would need to exceed available resources in every single year that the clawback was purported, and that there would have had to have been no resources available to the Commonwealth to pay the public debt other than the excise taxes in any year where budget appropriations exceeded available resources.

These too are factual issues that depend on discovery, which defendants have not had access to yet. To properly test plaintiff's contention, defendants will require discovery into the Commonwealth's available resources, how those resources were misspent in violation of Article VI,

Section Eight, and the uses of any revenues that were retained.

Plaintiff asserts that the declaration by Congress four years ago, that the fiscal emergency is tantamount to the required analysis. Not so. The generalized declaration of a fiscal emergency is not a substitute for the particularized analysis of resources and expenditures required as a prerequisite to clawback or retention based on a clawback analysis. There has been no discovery in these cases as to the existence, scope and findings of that required analysis, and such evidence is essential in determining the validity of the Commonwealth's actions here.

And, Your Honor, I do want to, at least with respect to HTA, discuss for a minute Fund 278. Now, I know the Court has already, in the context of the Lift Stay Motion, looked at the existing documents relating to Fund 278; but there is no dispute that Fund 278 exists and is tagged with specific HTA subaccount identifiers, and that Fund 278 transaction approval authority was specifically delegated to HTA.

And while I understand the Court initially discounted such evidence, an essential question remains unanswered and should be explored in discovery: Why was Fund 278 even necessary? The Commonwealth says it was an accounting mechanism. Well, an accounting mechanism to account for what? And why was such an accounting needed?

When we attempted to seek the justifications of defendant -- of the government's actions with respect to various escrow issues, we were shut down at the 30(b)(6) deposition. Defendant should have the opportunity to explore these questions in the context of this adversary proceeding and as part of their yet unasserted defenses and counterclaims.

Interpretation of the Excise Tax Statutes and whether and to what extent funds have been made available for HTA are, at minimum, mixed questions of law and fact that should not be decided at this early stage on summary judgment. And I do know that, given Your Honor's Lift Stay Motion decision, there were a number of instances in which Your Honor literally interpreted a number of the statutory provisions. For instance, the interrelationship between resolution Sections 401 and 601; the meaning and the interpretation of the words "other obligation." And we do take the position that while the Court made determinations about the existence of colorable claims then, the interpretation of these provisions are at least mixed questions of law and fact now which should be decided only after a full record and not at this early stage of summary judgment.

I think it is important to spend a few minutes addressing plaintiff's total mischaracterization of Rule 56(d) and its procedural requirements. Defendants' reliance on Rule

56(d) is neither untimely nor procedurally improper. Rule 56(d) is generally the part of a basis for opposing a summary judgment motion. It's expected, if appropriate, to be part of the file. It's not a separate motion. It's not even a motion at all. It's an appropriate basis for opposing the type of motion that is here, a summary judgment motion. Just because there may be identified material facts in issue does not mean that there cannot also be a valid basis for denying the Motion and ordering that discovery proceed.

Defendants claim that we were not diligent. Well, that is just not true. The Board pressed for this schedule for summary judgment motions, preceding answers in discovery, fought discovery, and then accused us of sitting on our hands when, in fact, the timing was actually set by this Court.

As was contemplated by this Court, the Motions for Summary Judgment were to be limited to those issues that did not raise material, disputed issues of fact. And as the Court recognized on the March 4th transcript at pages 220 to 221, and as all the parties understood, defendants would have the right to use 56(d) as a safety valve to oppose summary judgment to the extent the government's motion was overbroad.

That is the case here, and defendants have done nothing more than follow the procedures anticipated by the Court by submitting the required declarations under the rule and arguing that discovery is needed. Those declarations set

forth in detail and as required the discovery needed and the disputed facts such discovery related to.

Plaintiff's assertion that defendants did not timely request discovery ignores that, over defendants' objection, these cases, including discovery proceedings, were under a Stay Order. And also, contrary to plaintiff's assertion, defendants' Rule 56(d) argument is not precluded merely because defendants have concurrently attempted to oppose the Summary Judgment Motion as best that they can without discovery.

Defendants' papers in numerous places recount the need for discovery, and the case law is clear that simultaneous alternative arguments of this type are not prohibited. Indeed, what occurred here is quite common and distinctly distinguishable from the few off-point cases relied upon by plaintiff. In those cases, either the party opposing summary judgment either failed to follow Rule 56(d) requirements, or used Rule 56(d) as a second bite at the apple after the Court had already ruled on summary judgment. That is not the case here.

Plaintiff argues the various 56(d) Declarations are speculative and do not identify the specific facts defendants expect to obtain. However, as First Circuit case law establishes, the purpose of Rule 56(d) is to reveal unknown facts. Rule 56(d) does not require or anticipate that a party

seeking discovery have a crystal ball to be able to identify the facts that discovery will establish. Indeed, the existence of discovery, by its very nature, is at least somewhat speculative. All that is required is that a plausible basis be shown that material facts may conceivably raise a triable issue of fact.

To -- plaintiff's cases that they rely upon have facts in which declarations were submitted that -- either had gauzy generalities alleged, merely identified witness lists, were wholly conclusory statements, or mainly issues of law. The declarations set forth in this case, including the Servais Declaration with respect to HTA, and the Hughes Declarations as well, set forth with specificity the discovery sought, and met, under the PHC standard, the "necessarily low" standard of establishing the materiality of the requested discovery. And indeed, just to give the Court a number of examples, we've talked about the ambiguity of statutes, and the interpretation of statutes, and how the government parties interpreted the statutes and -- by their actions, more recent Fund 278 documents accounting for the Sinking Fund, documents relating to the HTA subaccount information, documents relating to the appropriations process, documents relating to any further bond-related agreements or documents that we were not signatories to, documents relating to essential services determinations or clawback uses of funds.

I would refer Your Honor to paragraphs 47 to 80 of the Servais Declaration, where we list out all the issues and discovery sought. The limited discovery that we obtained in the Lift Stay proceedings is no substitute in substance or scope to the full discovery rights within these adversary proceedings, where final claim determinations should be based on a full record. It should -- is not unimportant to indicate that plaintiff is seeking a final adjudication here of defendants' rights.

And the discovery in the Lift Stay actions was limited to just a few paragraphs in the government's briefs, and further limited by Judge Dein's ruling on the Motion to Compel. And as I said before, during the 30(b)(6) deposition, when we asked about underlying rationales behind certain actions by the government, the government parties objected and directed their witness not to answer.

And significantly, the scope of discovery for the Lift Stay Motions was framed and briefed eight weeks before the FOMB even filed its Summary Judgment Motion, so whatever facts and additional facts have been raised by the Motions would not have been addressed then.

So a number of points that I would like to address that Mr. Bienenstock pointed to. Mr. Bienenstock, in relation to the 544 claim, made a statement to Your Honor that what he was really talking about was Section 544(b), not 544(a).

Well, if that's the case, that's news to us, because the Complaints and adversary proceedings there do not state causes of action under 544(b). They only state causes of action under 544(a).

And, as we set forth in our brief, the Section 544 avoidance claims are time-barred. I realize Mr. Bienenstock did not address that, but this was all set forth in detail in our papers as to why they are time-barred.

Mr. Bienenstock does talk about the hypothetical lien issue, but indeed, under 544, avoidance is not available because no hypothetical judicial lien creditor could exist as to HTA or the Commonwealth under Commonwealth law as is required under Section 544's plain language. The Commonwealth is protected by sovereign immunity, despite Mr. Bienenstock's allegations, as a matter of policy, prevented from being the subject of an attachment of a judicial lien.

We've cited to the Court the *Diaz* case, the *Libortex* case, and Puerto Rico Act 66 of 2014 that basically restrict relief we attest not to attachment of judicial lien, but repayment plans. And the reasoning behind these prohibitions is to avoid the interference with the execution of public function. So the Commonwealth is not a Section 544 defendant, and, therefore, Mr. Bienenstock's argument that Section 106 applies is just wrong, because by its terms, Section 106 only applies for claims that are against the government.

Now, Mr. Bienenstock also talked about PROMESA Section 301(c)(7). 301(c)(7) does not make the Board a trustee in bankruptcy. It only effectuates a substitution of the term "Oversight Board" for the term "trustee." It does not provide the Oversight Board as a trustee. And indeed, if Your Honor looks at the HTA 926 Motion in case 17-3283, it's at ECF 13929, at paragraph 44, note 19, the Board concedes that it is not a trustee.

Now, Mr. Bienenstock also talked about, with respect to the perfection issue, that money and -- the medium of exchange argument that Mr. Bienenstock talked about. Well, Mr. Bienenstock misunderstands our argument that any security interest in deposit accounts would be perfected as a security interest in identifiable proceeds.

Well, first of all, I think the Board mischaracterizes the nature of our collateral in its deposit accounts, first of all, because collateral is a deposit account only when it fits the narrow category, when security documents specifically grant a security interest in an account maintained with a debt. That's not the case here.

Resolution Section 601 grants an interest in revenues. Resolution Section 601 grants a security interest in money, and the Sinking Fund, which is a special fund, not a deposit account at a bank. So at minimum, there's an issue of fact as to the existence of any deposit account and any

deposit or control agreement. But, of course, even when you get to the issue of money and the protection of money, the fact is the UCC definition of money includes any medium of exchange.

We are not saying that deposit accounts are a medium of exchange. We're saying that money is a medium of exchange, which is how the UCC defines money. To the extent defendants have a perfected security interest in money, and that money is somehow later transformed into a deposit account, and the deposit account is proceeds of the money, and the perfected security interest would attach to the proceeds -- and, of course, that is under 19 L.P.R.A. 2265(a)(2)(C).

But, in any event, the Board's protection argument is irrelevant, because the Board's Complaint never even challenges any security interest in revenues and money. The entire Complaint is premised on the incorrect notion that defendants' security interest is in deposit accounts as original collateral, which it is not. So any issues related to defendants' security interest in revenues and money therefore fall outside of the scope of the Complaint, and any arguments by the Board on these issues fail as a pleading matter.

Just looking here to see what else I have, if anything.

So, Your Honor, where are we, you know, right now?

We're in a position -- what's different now? So we're in a completely different procedural posture than we were when we were before you on the Lift Stay Motion. There's a different burden. Plaintiff has the burden here. There's a different result. This is a summary judgment proceeding that could have the impact of addressing with finality the Monoline Defendants' rights.

The need for a full record and final resolution of facts is extremely important here. There are broader legal issues that are before the Court here than there were on the limited Lift Stay Motion. And indeed, our defenses to counterclaims have not even been asserted yet. From our perspective, it's the plaintiff, the Board, that chose to proceed in this manner and in this largely premature manner. And it's our position, Your Honor, that, as such, the consequences of that should be borne to the plaintiffs in terms of not having the Summary Judgment Motion granted.

I think that there's only one more point that I wanted to make before I pass on to Ms. Miller and Mr. Berezin. As Mr. Bienenstock mentioned, at paragraph three of our Sur-Reply, we cited *Kentucky Employees Retirement System versus Seven Counties* to establish that statutory obligations are not mere contracts and cannot be rejected. Well, contrary to Mr. Bienenstock, this proposition in *Kentucky* was not based on 28 U.S.C. § 959(b). At page three, the Sixth Circuit

stated categorically, and without reference to Section 959(b) that, "if the Kentucky Supreme Court found the relationship to be statutory in nature, Seven Counties would be unable to reject its obligation to participate as an executory contract, which would resolve the core claim raised" in the adversary proceeding.

The Sixth Circuit went on to say that the issue of whether that obligation must be faithfully maintained during the pendency of proceeding under 28 U.S.C. § 959(b) would remain as a separate issue. So that should dispose of that.

Unless Your Honor has further questions for me, I'm going to defer the remainder of my time to Ms. Miller and Mr. Berezin.

THE COURT: Thank you very much, Mr. Natbony. I think you have five minutes left of your time.

MR. NATBONY: Thank you, Your Honor.

MS. MILLER: Good morning, Your Honor.

THE COURT: Ms. Miller, good morning.

MS. MILLER: Good morning, Your Honor. Atara Miller from Milbank on behalf of Ambac.

As is becoming routine, I'm going to begin my argument this morning by addressing the preemption arguments raised by the Board. And for purposes of this discussion, I'll address HTA, PRIFA, and CCDA together. Later, when it's relevant, I'll go through the specifics of each

instrumentality, but for preemption, we can think of them all together.

And as Mr. Natbony noted, the procedural posture here is quite different from the last time we discussed this issue. And as Your Honor noted in your questioning of Mr. Bienenstock this morning, the Oversight Board somewhat unconventionally asserts in its Adversary Complaints separate causes of action seeking disallowance of defendants' claim based on different legal theories, rather than seeking disallowance, and then supporting a claim for disallowance with various legal arguments.

And in particular, as relevant to the preemption arguments, the Oversight Board asserts counts seeking judgment, disallowing defendants' claim based on unlawful retention of the revenues because the enabling statutes were purportedly, quote, preempted by PROMESA. So this odd pleading approach actually simplifies the preemption analysis, as I think some of Your Honor's questions were teasing out earlier today.

So despite moving for summary judgment on those counts seeking to disallow defendants' claim based on the preemption theory, the Oversight Board has acknowledged, and I think even Mr. Bienenstock acknowledged this morning, that preemption is not itself a basis for disallowing defendants' claim. As an example, in the CCDA Reply, at page 55, the

Oversight Board states that "PROMESA preempts any territorial law appropriating funds not provided for in an Oversight Board certified budget. Nothing more. The legal effect of this action is not to, "strip any claims or rights defendants may have." Whatever claims or rights they have remain and will receive the treatment provided in an eventual plan of adjustment."

Accordingly, the Oversight Board's Motion for Summary Judgment on Counts 5, 26, 47, and 66 of the CCDA Complaint; 11, 37, 63, and 87 of the PRIFA Complaint; and 5, 28, 51, 74, 97, 119, and 141 of the HTA Complaint should be denied.

That raises the question, why, if the Oversight Board recognizes this necessary limitation of any preemption argument, does it spend dozens of pages and did Mr. Bienenstock lead with it in his argument this morning trying to persuade this Court to endorse it. So if one steps back and considers the big picture, the answer is actually pretty evident.

Preemption is the tool that the Oversight Board is looking to use to solidify its absolute, unfettered and unreviewable discretion in controlling creditor outcome. In an ordinary municipal restructuring, the debtor's actions and the proposed treatment of creditors are constrained by Chapter Nine and evaluated by the Court in a confirmation process; and that is exactly what Title III of PROMESA contemplates.

The Oversight Board, however, through preemption, is seeking to eliminate creditors' rights and the obligations of the Commonwealth and its instrumentalities outside of and before the Title III process. Through Certified Fiscal Plans and Budgets, the Oversight Board theorizes it can choose the winners and losers and lock in the state of those creditors, regardless of whether there is even a pending Title III case.

The Title III process, as the Oversight Board would have it, becomes nothing more than an evaluation of whether the Plan conforms to the creditors' rights that the Oversight Board has already unilaterally imposed through the budgets. And I think Mr. Bienenstock said something like, well, it preempts for as long as we decide to have it preempt. We could do 20 years, 30 years, 40 years. Whatever we put into a fiscal plan or budget is what would define it.

In a preemption world, Title II does the heavy lifting on the restructuring, and Title III just comes in to do the cleanup. For purposes of the pending Summary Judgment Motion, preemption is still important, however, because it's the purported legal theory for the proposition that either the Commonwealth did not violate any Commonwealth law, because the revenue bond statutes were preempted, or that any breach of an existing obligation was caused by federal, not Commonwealth law.

These premises are foundational to the Oversight

Board's objection to defendants' Section 407 and Contract Clause claims. So I am going to -- even though they're preemption -- their Motion for Judgment on their preemption claims can easily be denied, I'm still going to have to engage with it.

The Oversight Board again advances, as we heard repeatedly this morning in the rattling off of sections, numerous theories of preemption, framing focused first on express preemption based on Section Four, arising from Section 202, 207, Title III, or then, alternatively, implied preemption. And I'll take them each.

First, the Oversight Board contends that by granting fiscal planning and budgeting powers in Sections 201 and 202 to the Oversight Board, Congress preempted all Commonwealth laws that obligate the distribution of money not in the budget. And frankly, on this point, I'm almost never sure when I stand up to speak exactly what the Oversight Board's position is going to be.

And there are two oscillating factors that I want to highlight, because I think the inability to lock in on one demonstrates how neither can be a valid reasoning. And one is whether it's the Fiscal Plan or the Budget that preempt. And I thought that the Oversight Board had walked away from the notion that the Fiscal Plans preempt by saying, I think expressly, that they recognize that the Fiscal Plans have no

legal weight and can't preempt anything. But I heard Mr. Bienenstock say this morning that the Fiscal Plans and the Budgets preempt, and they need the Fiscal Plans under Mr. Bienenstock's theory, in response to your question of the scope of preemption, because Budgets are annual laws. And so if they want to have a preemption theory go beyond and cover 20, 30, or 40 years, it has to come through the Fiscal Plan.

So that's one oscillating point. And the other one is whether the budgets actually preempt or not, and what they're preempting.

So I'm going to assume for purposes now, because I think where Mr. Bienenstock last lay the marker is that the budgets are preempting, so -- but because Commonwealth laws can't preempt anything, as we heard Mr. Bienenstock explain this morning, the Oversight Board argues that the Commonwealth budgets are actually federal laws. And that's kind of a head scratcher in itself. And as Your Honor noted, it's actually contradicted by Section 202 itself, which provides that, in the event that even when the Oversight Board develops the budget itself, it has to be, quote, "deemed approved by the Governor and the Legislature." And that's because you have to have a Commonwealth Act, a Commonwealth Act of law, that dictates to the Commonwealth what expenditures it's going to make in that particular year.

The Oversight Board, though, actually recognized as

much, and affirmatively argued, for example, at page seven of its CCDA Motion, that the legislature has repealed the revenue bond statutes because, PROMESA § 202(e)(3)(A) expressly provides a Commonwealth budget developed and certified by the Oversight Board is 'deemed to be approved by the Governor and the Legislature.'

And that was in response to the argument that says that, actually, the excise taxes have never been repealed. So where they want to say that they were repealed, it was done by this legislative act, the deemed approval of the budget.

This conclusion is all --

THE COURT: Were you -- I'm sorry. Go on.

MS. MILLER: No. I was just going to say that this conclusion is also necessitated, although it wasn't raised this morning, by the Supreme Court's decision in *Aurelius*, which recognizes that the Oversight Board, in its action, is exercising territorial, not federal powers.

THE COURT: Yes. I understand your argument.

And so are you saying with respect to the repeal effect, that to the extent there is implicit repeal, it could only be by the approval of the budget, which is necessarily cabined annually by this argument by the Oversight Board, *et al*?

MS. MILLER: So I'm actually going to get to the repeal argument a little later, but the basics -- my basic

take on it is that a budget can't repeal anything. I mean, Mr. Bienenstock himself said that the only thing that a budget does is authorize disbursements within a particular year. It doesn't modify an obligation.

And so the repealing of the statute would actually require a modification of the obligation, which nobody suggests that a budget actually does. The budgets can't repeal laws. If you want to repeal the obligation, you have to go out and actually change the excise tax law.

One interesting note here is that the Oversight Board, in all its discussions, doesn't actually address what would happen if the budget were a Governor or legislature presented budget that was simply certified compliant by the Oversight Board. And there it would clearly have been expressly and directly passed by the legislature, and -- by the Puerto Rico legislature. And it seems like the Oversight Board's argument is that its certification would magically convert a Commonwealth statute into a federal law with preemptive power.

So, I mean, that's just one way of thinking about this argument that makes it clear that it just can't be right. So as an alterative, the Oversight Board argues that the budgets themselves don't preempt. I'm not relying on the budget, but I'm only relying on the fact that PROMESA created a conflict upon enactment, that by granting the Oversight

Board authority over fiscal plans and budgets, the Oversight Board argues, Congress immediately preempted all Commonwealth laws providing for the disbursement of funds, wiping clean the slate for the Board to start its work and decide how money should be allocated.

So under this theory, Congress left the Commonwealth without any authority to make payments or transfers for over a year after PROMESA was enacted until the Oversight Board was appointed and a Commonwealth budget certified. That's plainly not what happened. And so the suggestion that all of these laws were actually preempted and couldn't be complied with regardless of, you know, the Certified Budget, I think is sort of logically impossible. It's also inconsistent with the limited conflict preemption articulated in Section Four.

It's hard to believe that through this provision alone, Congress preempted all of the laws obligating the payment or transfer of money. And numerous sections of PROMESA show that this isn't what Congress intended.

I know we discussed them last time. We have them in our Brief. I'm not going to go through them again. But there's no question that, you know, there is at least in Section 303, particular preemption, which specifically identifies particular Commonwealth statutes and executive orders that are being -- that were preempted by Congress. And the idea that they then, you know, silently preempted every

statute that directs money to anybody is just somewhat inconceivable.

So at a high level, keeping in mind the balance that Congress was trying to strike between providing Puerto Rico with some relief, but also was protecting creditors, and thinking about the stated goals of PROMESA to allow Puerto Rico to regain access to the capital market, as well as the really complex Title III and Title VI procedures that they developed and built into the statute, it's hard to find credible this idea that they really preempted all of these statutes, including the Revenue Bond Statute, stripping the revenue bondholders of the value of their collateral and leaving them with empty obligations.

So Mr. Bienenstock didn't discuss it this morning, but the Oversight Board relies on the First Circuit decisions in *Vazquez-Garced*. That decision is inapposite. It doesn't address at all, and I don't think there was discussion of it this morning, but Your Honor I believe at the last hearing actually recognized and asked a question related to this. But that -- nothing in the First Circuit argument actually went to the effect, if any, the Oversight Board's control over budgets would have over -- on pre-existing obligations. It dealt exclusively with the ability of the Governor in that instance to reallocate or reprogram monies that had not been spent in a prior fiscal year, a process that was clearly set out in

PROMESA, including in Section 204, in a manner that was inconsistent.

This Section Four, conflicts preemption, clearly applied there, but the same is not true here. On this motion, the Oversight Board identifies Section 207 as an additional force of preemption. As Your Honor noted this morning, Section 207 says nothing about repayment of existing debt obligations.

Mr. Bienenstock suggested that the inclusion of redemption does cover that, but redemption does not mean ordinary course scheduled debt payments. Redemption is a term commonly used. It means the payments of the estate -- value and any remaining interest at maturity on a bond, not the payment of regularly scheduled debt service.

So, you know, if anything, you could look at the fact that Section 207 basically covered every aspect of debt payment reissuance, renegotiation, and required Oversight Board consent; but expressly carved out of that, the ability to repay -- sorry, the ability to continue making scheduled debt service, leaving that within the Commonwealth power and ability.

So next, the Oversight Board argues that movant's claims are preempted by Title III of PROMESA, which only recognizes an administrative priority. And I think Your Honor's probably tired of hearing me say this, but I just want

to reiterate that it's Ambac's position, and I know FGIC joins in this position as well, that this theory applies equally to the GO bondholders. But that the Oversight Board is resisting having that question litigated in that context so that it can use a pretextual settlement thereof for 20 times what they're offering the revenue bondholders as the anchor of a GO-centered Plan of Adjustment.

But as against the revenue bonds, the Board's argument fails on the merit, and it's irrelevant, frankly, for purposes of this motion. Title III addresses only the treatment of claims in a plan of adjustment. It does not abstractly preempt rights or reprioritize claims. There's no plan here, and at an appropriate time, we'll talk about it.

The Oversight Board suggests that Title III has to preempt, because it would otherwise require payments in full of the revenue bond debt. But whether or not the debt needs to be paid in full will be determined by the provisions of Title III in a plan of adjustment, as is the case in all municipal bankruptcy proceedings. Title III is not a source of preemptive elimination of rights before confirmation.

In addition to express preemption, the Oversight Board argues that the revenue bond statutes are -- impliedly preempt, as contrary to the overall goal of PROMESA. This argument also just falls. Implied preemption is narrow and generally disfavored. It applies only where two acts cannot

be reconciled or consistently stand together.

The Oversight Board itself recognizes that the question of whether elimination of the Commonwealth's obligation under the Revenue Bond Statute is necessary for the Commonwealth to achieve fiscal responsibility and access to the capital markets, two of the express purposes of PROMESA, is subject to, quote, opposing views. This alone precludes summary judgment. You can't have opposing views on factual questions and still move for summary judgment.

This also addresses the argument Mr. Bienenstock raised this morning to -- Section 108(a)(2) would preempt, because again, 108(a)(2) is a reference to the purpose, and as Mr. Bienenstock says, there are conflicting views and ideas about what the purpose of the statute is.

The Oversight Board's conclusory assertion that the Commonwealth could not reorganize its debt without revenue bond statutes being preempted, based exclusively on the declaration of Adam Chepenik that it would result in 20 percent of the annual spent being outside of the budgeting authority of the Oversight Board, is not enough. This is a factual question on which defendants have obtained no discovery.

The application of implied preemption is also contrary to the expressly defined contours of PROMESA preemption defined by Congress and included in Section Four.

In addition to express and implied preemption, the Oversight Board refers again to the non-entrenchment principle. And I love the image of me, myself being an alchemist, doing magic. I shared it with my children. They got a great laugh out of it. But we are not the ones who are introducing or who have ever introduced the non-entrenchment principle.

I do think that at least the Oversight Board has now recognized that it is fundamentally distinct from the idea of preemption, but they do advance it as a separate and independent basis to simply avoid paying -- meeting their statutory obligations. And Mr. Natbony addressed some of it, and I just want to add that, you know, as previously discussed, you know, Mr. Bienenstock talks about 200 years of bankruptcy law preempting. No one's looking to unwind or undo 200 years of jurisprudence. What we're trying to do is have bankruptcy law apply, as bankruptcy law would apply, and not live in this world where other theories of alternate preemption can avoid rights and have you go into the bankruptcy process naked. That's not what anybody in bankruptcy ever contemplated, but that's what the Oversight Board would have done here.

But the Oversight Board, in suggesting that you can simply default without consequence, is avoiding, you know, 150 years of jurisprudence that they don't address, starting with *Von Hoffman versus City of Quincy*, which you know I like, and

the progeny from that. And there, the Court held that it's clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied.

The state and the corporation in such cases are equally bound. The power given becomes a trust, which the donor cannot annul, and which the donee is bound to execute.

And Your Honor asked Mr. Natbony earlier whether, you know, any beneficiary of a statutory obligation is entitled to specific performance under all circumstances. And while that may be an interesting theoretical question, it has no bearing on the facts before us here. Right. What we are dealing with is a fact pattern that's directly analogous to the facts in *Von Hoffman*. And the Supreme Court has already answered the question that you are entitled to mandamus for specific performance.

Now, at argument, Your Honor asks about -- argument on the Lift Stay Motions, Your Honor asked about the interplay between the *Von Hoffman* line of cases and the more modern Contract Clause analysis. Notably, as I think you identified this morning, the Oversight Board in its Motion does not even suggest that this Court should apply a modern Contract Clause substantial impairment analysis. It introduces no evidence,

probably because it recognizes that it's a clearly factual issue; actually, didn't move for summary judgment on that portion of -- or those portions of the various Contract Clause claims. I'm not even sure how to characterize their counts.

So the counts seeking summary judgment -- seeking disallowance of claims based on Contract Clause, based on the theory that the impairment was reasonable and necessary, are not part of their Motion. Instead, it just simply reiterates and rests on the same non-entrenchment argument.

The only additional argument that the Oversight Board makes is in response to defendants' argument that --

THE COURT: I'm sorry.

MS. MILLER: Go ahead.

THE COURT: I just want to be clear. You said they just rest on the same non-entrenchment argument. Do you mean to say that their non-impairment argument always circles back to and boils down to non-entrenchment, or did you mean to say non-impairment?

MS. MILLER: No. I meant to say non-entrenchment. Meaning that the -- well, I guess they say that there is no impairment, and for that they don't suggest that it was reasonable and necessary impairment. They just say blanket non-entrenchment means that there's never an impairment. And they go on and on about how it was enacted by, you know, the 1988 legislature, and now we are in the 2020 legislature. So

they're relying on non-entrenchment as a basis for nonimpairment --

THE COURT: Thank you.

MS. MILLER: -- rather than suggesting that it's not reasonable and necessary.

THE COURT: Yes.

MS. MILLER: Or that it was reasonable and necessary.

THE COURT: Thank you.

MS. MILLER: The only additional argument that they make in response to the argument that non-entrenchment was purely hypothetical because the laws weren't validly amended is, as I mentioned already, that they were abrogated by the budget, which only reinforces the Contract Clause claim here.

So the Revenue Bond Statutes have thus not been preempted by PROMESA, and any violations thereof bring with them the attendant consequences. And any Title III restructuring must occur against the backdrop of those existing rights and obligations.

So unless Your Honor has any other questions on preemption, I'm going to turn to Section 407.

THE COURT: That's fine. Please do.

MS. MILLER: Okay. Thank you.

Section 407 was included in PROMESA as one of a suite of provisions expressly intended by Congress to protect

revenue bondholders, and in particular, to address the Commonwealth self-help tactic of taking or redirecting monies pledged to or intended to be used to pay revenue bondholders.

As the Senate Republican Policy Committee Legislative Notice makes plain, Section 407 was a direct response to the Commonwealth's diversion of HTA and other revenue bond revenues, which diversion Congress believed it was putting a stop to through the preemption of the relevant executive orders and moratorium acts in Section 303, and a concern that Puerto Rico may attempt to redirect funds again.

Congress, in an admittedly less than perfectly crafted provision, created two causes of action: One, to prevent the transfer of instrumentality property subject to creditor's lien or security interest, and the second, to prevent the diversion of money that is statutorily required to be transferred to an instrumentality for the payment of its own debt.

In discussing Section 407, the Oversight Board makes two key errors, in addition to just their error in application. First, it conflates the two prongs of Section 407, contending that both require the transfer or diverted money to be, quote, property of the instrumentality. And second, it argues that 407 gives rise to an unsecured claim, which although it doesn't say this expressly, it plainly believes it can be impaired under a plan and be paid in what

Your Honor has previously described as teeny, tiny, little bankruptcy dollars.

The second issue is not properly before the Court on this Motion. The Oversight Board's Motion seeks summary judgment on the specific counts in its Complaint seeking to disallow the 407 claim. The Oversight Board's argument that the Court should nonetheless reach this issue is based on their boilerplate prayer for relief in the Complaint, quote, for such other relief as the Court may deem appropriate. Our view is that that's simply an insufficient basis for the Court to rule on the nature and classification of any resulting 407 claim.

In any event, the Oversight Board's legal premise regarding the nature of the claim is defeated by Section 407 itself, which provides that, "the transferee shall be liable for the value of such property." When the property at issue is money, as it is here, there's no debate about the value of that property. Creditors pursuing Section 407 claims, therefore, do not obtain unsecured claims subject to impairment. They receive the right to receive the value of the improperly transferred or diverted funds.

Section 407 creates a bespoke fraudulent transfer-like cause of action enforceable directly by creditors, which returns value. Section 407 provides some breathing room to the Oversight Board and the Commonwealth by

precluding creditors from enforcing Section 407 while a Stay is in effect, but it requires that any transferred or diverted monies be returned to the instrumentalities before the expiration or lifting of the Stay.

Stated differently, Section 407 precludes confirmation of any plan premised on the use of monies that belong to an instrumentality or that would deprive an instrumentality of money statutorily allocated to it for payment.

The Oversight Board points to Section 201(b)(1)(M) to support its position that an interinstrumentality transfer could be approved in a plan of adjustment or qualifying modification. The Oversight Board ignores, however, that Section 407 includes no such limitation. Congress could have included a parallel carve-out from Section 407, but did not. Section 407 is, therefore, better understood as the limitation on interinstrumentality transfers that can be included in a plan.

Turning now to the two prongs of Section 407. The first prong of Section 407 requires: One, a transfer of property of an instrumentality; two, that the transfer is in violation of applicable law; and three, that the property is subject to a valid pledged security interest or lien on such property, or would be subject to such a pledged security interest or lien absent a violation of applicable law.

The Oversight Board relies entirely on its preemption clawback and non-entrenchment arguments to support its contention that the transfer does not violate applicable law. I've already addressed preemption and non-entrenchment. And as Your Honor has already recognized, clawback is an inherently fact-specific inquiry, which on its own should preclude summary judgment.

Whether the property is subject to a valid, pledged security interest or lien is also the subject of much debate, as Your Honor knows. We previously argued our position to the Court in connection with the Lift Stay Motion, and they are set out in detail in our briefs, understanding and respecting Your Honor's prior rulings, with which I think you know we respectfully disagree. I'm not going to go over those arguments again here.

I'm going to note that -- our position that the first prong of Section 407 does not require an attached, perfected security interest, but rather applies in instances as would be the case here under Your Honor's Lift Stay decisions, at least with respect to HTA and PRIFA, where creditor has a valid lien, but that lien has not yet attached to the property.

The Committee Notes on Section 407 directly support this position. In the Opposition, the Oversight Board, as Mr. Bienenstock cited this morning, in a statement by -- on the House Floor by Representative Grijalva, expressing his

opinion on the Committee Note. That Representative Grijalva felt the need to make the statement on the floor makes plain that the text lends itself to the interpretation presented in the Committee Notes and advanced by defendant. That Section 407 extends to property subject to a lien, whether presently or in the future, if -- flowed as required.

Representative Grijalva's speculation about what he believes was the intent of Congress is no more binding or persuasive than the Committee Notes. And, in fact, Congress took no action in response to Representative Grijalva's comments. The Notes were allowed to stand, plainly evidence a majority disagreement with his statement.

The remaining dispute on the first prong rests on whether the transfers were property of an instrumentality. The Oversight Board contends, and you heard Mr. Bienenstock say it again this morning, that the Court already decided this issue. But whether the money is property of the instrumentality was not presented in the Lift Stay Motions at all. The only question that the Court considered was whether the Commonwealth had an interest sufficient to have the Stay applied.

The question of whether the instrumentality has a property interest must be evaluated under state law, which creates and defines property. In HTA -- and here I'm going to walk through each instrumentality separately just because the

statutes are obviously different. In HTA, pursuant to the excise taxes, Treasury is required to deposit the excise taxes into a special fund, quote, in favor of, and in the name of, and for the benefit of HTA, and transfer the excise taxes to HTA's bank account, shall be covered into a special deposit and shall transfer.

The Commonwealth has also pledged not to reduce the taxes and to ensure that said amount shall be covered into a special deposit, in the name of and for the benefit of HTA. The Commonwealth thus collects and briefly holds the excise taxes solely in a trust capacity.

And on the Lift Stay Motion, the Oversight Board's counter-argument to defendants' argument that this language also gave rise to a trust in favor of the creditors was that the statutes allowed the instrumentalities to use the money for other corporate purposes. And whether or not that's right, after bonds have been issued, is a question that we dispute. But there's no suggestion that the trust wouldn't extend to the instrumentalities, giving them a property interest.

And similarly, in PRIFA, Section 1914 of the Enabling Act provides that monies, quote, when received by the Department of Treasury of Puerto Rico, shall be covered into a special fund to be maintained by or on behalf of PRIFA. And that's exactly what's happening now.

After being deposited in the Lockbox Account, the first 117 million are being transferred with a note saying "for deposit to the credit of PRIFA," and credited to the Infrastructure Fund, the special fund maintained by the Commonwealth for the benefit of PRIFA. But all of the first proceeds are property of PRIFA. Regardless of whether they are actually credited to the infrastructure fund, though, is evidenced by Section 1906(m), among others, which authorized PRIFA to -- well, 1906(m) authorizes PRIFA to pledge its property to secure debt issuances, including, I'm going to quote, "all or any portion of the federal excise taxes or other funds which should have been transferred by the Commonwealth to the Authority."

So they have the right to pledge the monies that should have been transferred by the Commonwealth to the Authority, but were not. So clearly, they have an interest in those monies that allows them to pledge. The non-transfer of monies does not reduce PRIFA's property or its ability to pledge that property.

And the Commonwealth also again covenanted not to limit or alter the rights given to PRIFA until all the bonds are paid in full. At a very minimum, there's a factual question regarding the nature of the fund into which the monies are being credited and PRIFA's rights with respect thereto.

And with respect to CCDA, the money is held in an account in the name of the Tourism Company, controlled entirely by the Tourism Company. They've been designated as restrictive in cash balance analysis by the Oversight Board on the basis that the Commonwealth has no means to access the money, and that the Commonwealth cannot even de facto obtain the cash in the account by reducing appropriations, because there are no annual appropriations to the Tourism Company.

The Oversight Board acknowledges here that, "the Tourism Company may have their legal title or similar attenuated property interest in the occupancy tax revenues." Well, we dispute the characterization, but the acknowledgment that CCDA has a property interest defeats summary judgment on 407 with respect to that.

Its argument that that property interest --

THE COURT: Just one --

MS. MILLER: Yes.

THE COURT: Just one second. So you're saying that -- surprisingly, I didn't memorize every single word of all of the briefs. So you're saying that the Oversight Board acknowledged that the Tourism Company has some sort of bare title interest, or that the CCDA has that interest as to money in accounts of the Tourism Company? I'm just trying to make sure I followed your last statement.

MS. MILLER: Sure. It's Reply paragraph 114, at note

63, and it's that the Tourism Company has it. But 407 isn't limited to -- 407 doesn't require the instrumentality to which the proffer -- the money has to flow to be the obligor on the debt. So the Tourism Company is an instrumentality. There's no question that this is property of an instrumentality of the debtor -- of the Commonwealth rather.

THE COURT: Thank you.

MS. MILLER: And so it's the Oversight Board's argument that that property interest is insufficient for 407, is -- I mean, they don't cite any support for it, and frankly, it's not supported.

The fact that all of the statutorily pledged excise taxes are, at a minimum, property of the respective instrumentalities, frankly makes academic our dispute with the Oversight Board about the elements of the second prong of 407. The second prong makes actionable any transfer which deprives a territorial instrumentality of property in violation of applicable law, assuring the transfer of such property to such territorial instrumentality for the benefit of its creditors. That is a mouthful.

The Oversight Board, however, reads the beginning of the first prong of 407, quote, as any property of any territorial instrumentality is transferred as an element of the second prong as well. The Oversight Boarding argues that it has to be right, because that is the "if" in the "if-then"

sequence. But frankly, there's no reading of Section 407 that's grammatically correct, regardless of whose position is adopted. So applying grammatical rules seems to be misplaced here.

The result of the Oversight Board's reading is that the second prong requires, as Mr. Bienenstock explained this morning, an instrumentality getting money and then losing it. So a transfer of property of an instrumentality, and then a transfer that deprives the instrumentality of that property, and then the deprivation and violation of a law assuring the transfer for the benefit of creditors.

This strips the word "deprive" used in the statute twice of any meaning. "Deprived" means to deny possession or use of something. It's different from taking or even clawing back, which is what the Oversight Board wants to reinterpret it as.

The Oversight Board's interpretation also makes this prong, read in its entirety, both illogical and impossible. 407 requires the deprivation to be in violation of a law that assures the transfer of property to the instrumentality. Well, how can a transfer of money from an instrumentality ever be in violation of a law assuring the transfer of property to that instrumentality?

Congress had the diversion of revenues from the revenue bonds in mind when drafting and adopting Section 407,

and they added the second prong for a purpose, not merely to address a theoretical impossibility. Defendants' interpretation, by contrast, gives meaning to the second prong, in particular by covering transfers which deprive the instrumentality of property that was statutorily obligated to it.

This interpretation is also the one that conforms with how the word "such" is used throughout Section 407. In almost all other instances in that section, property is qualified by the word "such," referring the reader back to the last description of the property, and it could have in the first sentence of the second prong as well. The second prong of Section 407, however, begins by simply using the word "property," meaning if the instrumentality is deprived of property, any property in violation of a law that assures the transfer of such property, i.e., the property being withheld from the instrumentality for the benefit of the creditors, then the transferee is liable. It doesn't have to be property of the instrumentality.

The Oversight Board also argues that there have been no transfers at all, and that the mere withholding of monies is not sufficient to give rise to a claim under 407. Based on the limited factual record, this appears to be factually incorrect. It's also a question of fact, which would preclude summary judgment and the required discovery.

THE COURT: Would you --

MS. MILLER: The CCDA --

THE COURT: Oh, are you wrapping it up?

MS. MILLER: Sure. Yes. I'm going to walk through each of them.

So at CCDA, as you heard Mr. Kass say, there is no dispute that there was at least one transfer from the Tourism Company to the Commonwealth after the Oversight Board was created. Mr. Kass then said, well, defendants have all of the evidence they need about all of the other transfers and they haven't identified any.

Well, what we have is evidence of Tourism Company accounts, but what we don't have is any evidence of who the recipient was. And we actually asked for that information. We identified, as outlined in our 56(d) Motion, a number of transfers out of Tourism Company accounts where the recipient was not identified, and which we couldn't match to an in -- a credit to -- on another account statement. And those could have been to the Commonwealth. We have no way of knowing whether or not those were transfers to a Commonwealth account or not. And discovery should be allowed at least to determine whether or not those were made into Commonwealth accounts.

And with respect to PRIFA and HTA, the Oversight Board bases its no transfer argument on a line of cases

stating generally that the withdrawal or deposit of cash in hand into one's unrestricted checking account is not a transfer, as those monies have the same legal character whether in your pocket or in your checking account.

As an initial matter discussed in our Brief, the Oversight Board's narrow interpretation of the word "transfer" ignores the numerous cases holding to the contrary, as well as the broad interpretation afforded to the term "transfer" both by the First Circuit, in the legislative history of Section 101(54) of the Bankruptcy Code, which expressly provides that a deposit in a bank account or similar account is a transfer.

So even under the cases that the Oversight Board relies on, where a checking account is not a transfer --

(Sound played.)

MS. MILLER: -- and these monies have the same legal character, that's not the situation here. So with respect to both HTA and PRIFA, on HTA monies collected and then deposited to the credit of Fund 278, that designation carries with it certain restrictions reflected in the Commonwealth's accounting statements, making it different from simply unrestricted, untagged cash in the bank.

And with respect to PRIFA, the monies are deposited first into a lockbox account, which has -- is an escrow account which has particular restrictions. The Commonwealth doesn't have access, cannot access them as it would cash in

hand. And then those monies are transferred into various accounts, some of which go with restrictions, and others don't. But clearly, those are transfers that are changing the legal character and restrictions imposed on the funds.

With respect to the final element of the second prong, that the deprivation is in violation of a law assuring the transfer, the Oversight Board actually doesn't even challenge that the laws at issue assure the transfer of property for the benefit of creditors. And we've already discussed the Oversight Board's contention that no such law was violated because each was preempted.

So before I pass the virtual podium to Mr. Berezin, and I hope I can squeeze this in, I just want to make one comment in particular about CCDA, because I think what the Oversight Board is doing on this Motion, frankly, is a little bit of smoke and mirrors. And in trying to recognize Your Honor's ruling, what they're saying, what you heard Mr. Kass say is, we're only now asking for partial, partial summary judgment with respect to this new category of revenues called retained occupancy taxes, which are defined as occupancy taxes not deposited in the transfer account.

Well, the limited discovery that we have shows that this is actually a null set. There is not a single dollar of hotel occupancy taxes --

(Sound played.)

MS. MILLER: -- that did not flow through this -- Your Honor, if I could just --

THE COURT: You can finish your thought.

MS. MILLER: Thank you. That didn't flow through the Scotia Bank 5142 account. The Oversight Board is, therefore, asking for a hypothetical advisory opinion, and, at the very minimum, it is their burden to show that there are facts that these rulings would actually apply to. And on that basis, summary judgment should be denied with respect to all of the claims with -- as respect to CCDA.

Thank you.

THE COURT: Thank you, Ms. Miller.

And so now, Mr. Berezin.

MR. BEREZIN: Yes, Your Honor. Good afternoon. Robert Berezin.

THE COURT: Good afternoon.

MR. BEREZIN: Thank you. Robert Berezin, Weil, Gotshal, & Manges, representing National Public Finance Guarantee Corp.

I will address for the Monolines the Contract Clause issues raised in the Board's Summary Judgment Motion. I just note at the beginning that the Board did not move for summary judgment that any impairment was reasonable and necessary, nor have they proffered evidence on that issue, so it would be improper for them to obtain summary judgment on an issue that

they raised literally at the midnight hour. And I won't address any of those points, as they were not in the papers.

So I'm going to begin, Your Honor, with whether a change in Commonwealth law impaired bondholders' contracts, and on that point, there's really no dispute that, after November of 2015, Commonwealth law was the opposite of what it was before. It required excise taxes to be withheld from HTA and the other instrumentalities. And the record before the Court shows that this change in law has been continuously in effect since November 2015, and notwithstanding the enactment of PROMESA or the filing of the Title III case.

Now, in the Motion, the Board argues that this sea change happened due to executive action, but that's not -- that's not so. The impairment began with the Emergency Orders, but the Emergency Orders were legislative actions. They were premised on the police power, which, under the Commonwealth Constitution, is a legislative power. They were also premised on the clawback provisions of the Constitution, and Constitu -- State Constitution or Commonwealth Constitution is a law for purposes of the Contract Clause.

The second Emergency Order has the same -- the same components. It also purported to be issued under the delegated authority pursuant to the OMB Act. So it's additional -- for that additional reason, it was a legislative action.

For the Moratorium Act and the Moratorium Orders, the Moratorium Act obviously is legislative. Any act -- expressly delegated the legislature's police power to the Governor, and the Moratorium Orders in turn were expressly issued under the Moratorium Act and purported to exercise the legislature's police power, again under the Commonwealth's Constitution, a legislative power. Nor did the Moratorium Orders merely execute or carry out the provisions of the Moratorium Act. Instead, the Governor was delegated the power to decide, one way or another, whether the legislature's police power should apply and would apply to the Commonwealth or its instrumentalities.

And indeed, the Court has already ruled that it was plausible that the Moratorium Orders constituted exercises of delegated state legislative power and are, therefore, laws in the *Ambac* decision. And we note that that decision was based on the same record that's before the Court. Namely, the text of the Moratorium Act and the moratorium laws. There was nothing special or specific in the allegations that would not be in this, presently before the Court. So the Moratorium Orders are laws for purposes of the Contract Clause, certainly at this stage.

Finally, the Fiscal Plan Compliance Act is obviously a legislation -- a piece of legislation, and is, therefore, a law under the Contract Clause. So we're not dealing with mere

executive action.

The Board's second primary argument is that the taking of the excise taxes was permitted by the contracts because there was a valid clawback in each fiscal year since fiscal year 2016. And I would note, Your Honor, whether a valid clawback was in effect rests at least in part on disputed factual contentions. That is what the Court found just this month in connection with the CCDA Lift Stay Ruling, and that must be true as well on summary judgment, particularly one filed before answers and discovery.

Mr. Natbony pointed out numerous factual issues that are implicated when one needs to determine whether a valid clawback under the Constitution was in effect for each fiscal year. I will just briefly touch on a few specific examples where the Board contends that they were met.

So, in the first instance, the Board points to a legislative finding in PROMESA, Section 405, but those findings are a complete mismatch to the requirements of a valid clawback. We describe that in detail in our Sur-reply. I won't repeat it, but I think, more importantly, a legislative finding is insufficient to resolve genuine issues of fact on summary judgment, particularly where, as you know, all reasonable inferences have to be drawn in defendants' favor.

The Board also argues that, well, the -- upon the

filing of the Title III, all 13 billion of GO debt automatically accelerated and became due, and therefore, available resources were insufficient. But again, in our papers, we demonstrated why that's wrong.

Just a few points there. There's no automatic acceleration provision in the Bankruptcy Code, so you have to default to what the rights of the parties were under Commonwealth law. That's the premise of bankruptcy. It doesn't change contract rights or other rights absent an express provision in the Code.

And the fact that bankruptcy law values a bankruptcy claim for the full amount of debt doesn't override and has nothing to do with when interest and principal payments are due under Commonwealth law, or how the valid clawback should be determined under the Commonwealth Constitution. And the Commonwealth Constitution clearly contemplates interest and principal payments would come due over time, and there would be no acceleration, so they clearly haven't met their burden on summary judgment on that issue.

Even if available resources, excluding the excise taxes, which are given a second priority under the Constitution and OMB Act, were insufficient to service GO debt, then the excise taxes can be used, but only to pay GO debt during that year. And the Board cannot show that this occurred, excise taxes weren't used to pay GO debt. And so

what the Board points to is, well, the Proposed Plan of Adjustment. And that doesn't work for multiple reasons that we pointed out in our papers.

I won't belabor those either, but given all of this, Your Honor, there are simply no grounds to grant summary judgment on the question of whether there was no impairment because of a valid clawback.

That brings us to the Board's argument that voluntary defaults caused the impairment. We would just note, Your Honor, that there's no rule of law that a government can change laws, violate statutes without any consequence under the Contract Clause when there's a substantial impairment. There's no case that says to the contrary, that authorizes such a thing.

And this isn't just a breach of contract or a default standing alone. There was a change in law that upended the rules upon which the agreements were entered, and that caused a substantial impairment. And the Board's argument that the legislative acts only delayed payment, they don't abrogate bondholders' contractual rights, so, therefore, there's no substantial impairment, is just wrong.

The way that substantial impairment -- the substantial impairment inquiry is set up, the reasonable expectations of bondholders are paramount. And there's no question on summary judgment that the reasonable expectation

of bondholders, or that excise taxes that were explicitly referenced in all of the official statements that went along with these bonds would be enacted, would not be changed, and that those funds would flow to HTA and to the other instrumentalities to permit timely debt service.

So when that flow of funds stopped for years due to legislative acts, that was a substantial impairment under the cases that we have cited and under Contract Clause jurisprudence generally. In addition, the legislative action here deprived bondholders of security under their contracts. That's true even under the Court's Lift Stay Ruling, because valuable property rights that otherwise would have attached had the flow of funds continued, did not attach due to the change in law. That is clearly a substantial impairment for sure.

So this is a Contract Clause violation. It's not a simple default. And that is -- that is another reason why the Board's arguments in favor of summary judgment fail.

Next, the Board argues that, well, federal law is really what caused the impairments. And so, okay, even assuming that there are substantial impairments here, they were caused by federal law.

They point to Title III in the first instance. So in Title III, Your Honor, it's clear that governments -- government debtors have -- just like any other debtor, have to

comply with the laws while in bankruptcy. There's no rule that exists in the Bankruptcy Code, there's no section of the Bankruptcy Code that excuses government debtors from complying with statutory law.

And this was addressed explicitly in *In Re: New York City Off-track Betting Corp,* at 434 B.R. 131. And certainly, in bankruptcy, the default for creditors' rights is state's -- or in this case Commonwealth law, unless there's a specific Bankruptcy Code provision that displaces that law. And no provision that has been invoked in Title III by the Commonwealth abrogates the Excise Tax Statutes or requires or authorizes the Commonwealth to violate them.

The Board points to the automatic stay, and a lot of the arguments they're making here really go to whether there's an immediate remedy for these violations. But that's a different question than whether those obligations exist and give rise to actionable obligations.

And we've certainly moved the Court for -- to lift the stay so that we can pursue our remedies, but the purposes of summary judgment, the obligation in these Excise Tax Statutes absolutely continue in spite of Title III. Certainly when we get to, as Ms. Miller indicated, the Plan of Adjustment, that's a different issue, and we'll get there when we get there. But to move for summary judgment now and to point to something in the Bankruptcy Code to say that the

obligations don't exist or that there's no -- that there's preemption, is inconsistent with the statutory text. It is incorrect.

The Board also points to the power of rejection. I think it backed away from that to a certain extent today, but statutes can't be simply rejected. And in any event, it's a hypothetical. The Commonwealth has never invoked Section 365 in respect of the bonds, in respect of the Excise Tax Statutes, so it's irrelevant. And rejection, in any event, doesn't destroy underlying contract rights, as was made clear in the Supreme Court's decision in *Mission Products Holding versus Tempnology.*

The next court refers to Title II and argues, well, it was Title II that caused the impairment. But we heard today that the budgets only address payments and do not address what do not need to be paid. And therefore, they don't eliminate the excise tax obligations. And that may be, but what's happening, as I explained before, is clearly a substantial impairment for all the reasons I've said.

And that -- and to the extent that the Board is relying on the budgets as the culprit for that substantial impairment, then that would raise Contract Clause issues, assuming that the Board -- that the Budgets are really relevant. And I just want to start with that threshold question.

The Board, throughout its arguments, assumes that the Fiscal Plan and Budget provisions pertain to the Excise Tax Statutes, and that's a fundamental, mixed legal and factual dispute. The Commonwealth Fiscal Plans and Budgets address resources that exclude the excise taxes, and this is clear in PROMESA, in Section 201(b)(1)(A), which provides that fiscal plans and budgets must be based on applicable law, which includes the Excise Tax Statutes that specifically exclude them from Commonwealth resources, as well as Section 201(b)(1)(M), which prohibits the Commonwealth from using assets, funds, or resources of a territorial instrumentality.

And under the Excise Tax Statutes, the excise taxes are HTA's funds, such as Fund 278, and resources, which is a broad term; and therefore, the excise taxes fall outside the scope of the resources covered by the Commonwealth fiscal plans and budgets. And at a minimum, there's at least a question of fact as to those issues, given the budgeting and other evidence that we have proffered. But even if the budgets were meant to include excise taxes, which we dispute, the budgets would be Commonwealth legislative actions.

FOMB is part of the Commonwealth government. Budgeting is a quintessential legislative exercise. The budgets, as you pointed out, Your Honor, they can be deemed approved by the Commonwealth Governor and Legislature just like any other Commonwealth law. So a certified budget is a

Commonwealth budget. It's not federal law.

So even if the Commonwealth budgets are the culprit behind the impairment, as opposed to the moratorium laws or acts and other Commonwealth pre-PROMESA enactments and post-PROMESA orders, there still would be a Contract Clause violation. But the Board argues that Title II of PROMESA expressly authorized or required the budgets to exclude excise tax transfers. That's an important issue, because if PROMESA doesn't expressly authorize or require the budgets to exclude excise tax transfers, then federal law did not cause the impairment. FOMB's local legislative actions did.

So to show that PROMESA expressly authorizes or requires excise taxes to be excluded, the Board points to PROMESA's provision granting the Board budgeting authority, but those provisions nowhere authorize or require the Board to certify a budget that violates the Excise Tax Statutes or that requires retention of the excise taxes. To the contrary, numerous provisions in PROMESA show that the fiscal plans and budgets should respect the Excise Tax Statutes. But in all event -- clearly, federal law does not expressly authorize or require the budgets to override the Excise Tax Statutes.

(Sound played.)

MR. BEREZIN: I'm showing I still have a couple minutes, Your Honor?

THE COURT: Yes. That was the two-minute warning.

MR. BEREZIN: Oh. Great. Perfect.

So FOMB's real argument underneath it all, because it can't point to an express provision that authorizes a budget to violate these statutory provisions, the real argument is that it's impossible for them to both certify a compliant budget and respect the Excise Tax Statues, because if FOMB could have certified a compliant budget that respected those statutes, then federal law did not cause the impairment, and the budgets, which would be legislative acts, would violate the Contract Clause.

And of course whether a budget would have -- whether a budget could have transferred the excise taxes and complied with PROMESA obviously presents profound factual issues that would preclude summary judgment.

I would just note at the end, Your Honor, 106(e) does not deprive the Court jurisdiction to determine if a Contract Clause violation occurred. The Court itself recognized that in *Ambac*. And it certainly doesn't preclude the inquiry we just discussed, as to whether a fiscal plan or budget could have complied with PROMESA and permitted the flow of excise taxes, an inquiry necessary to determine whether the Title II powers that the Board has really required, really required the impairments that occurred here.

With that, I'll conclude, Your Honor, unless you have questions.

THE COURT: No. You were very thorough. Thank you, Mr. Berezin.

MS. MILLER: Your Honor, Atara Miller.

THE COURT: Yes.

MS. MILLER: Your Honor, if I may use Mr. Berezin's last 20 seconds, I just have one small point that I realized I neglected to address.

THE COURT: Okay.

MS. MILLER: On 56(d), with respect to PRIFA, Your Honor asked Mr. Firestein about our assertion and showing that there are some questions related to the bond documents and whether it is a complete set. And I just want to note that Mr. Firestein suggested that we're making great weight of it, but doesn't actually argue that --

(Sound played.)

MS. MILLER: -- that the documents --

THE COURT: You can finish.

MS. MILLER: Thank you, Your Honor. That the documents before the Court are actually the operative or the complete set, which would be their burden on summary judgment. And we've raised a question that at least entitles discovery as to that point. It would seem that resolving that issue would be a necessary predicate to any final, binding legal determination about the bondholders' rights under the documents that we are talking about.

Thank you.

THE COURT: I just have a couple of questions for you about those documents. On the Trust Agreement discovery issue, from your discussion, it seems like the Supplemental Agreements would just be older versions of the '97 Agreements, and so why would those be material to this motion practice, besides obviously they'd be good to have? But why are those --

MS. MILLER: So I think, Your Honor, if you look at the document, it's actually hard to know what the supplements would be and whether the document that's added, the '97 version, is just the '88 -- a copy, you know, an updated font, but express duplicate of the '88, but incorporating the first and second supplements, or whether it was all integrated into a new sort of whole body.

And so that's exactly what we're trying to figure out, which is, it would seem, based on the signature page and the notary page, that the new, updated Trust Agreement is really just a retyped, you know, from typewriter to word processor, version of the '88 Trust Agreement. But the cover isn't indicating that it was amended by these two supplemental agreements, which have not been put in the record and we have not been able to obtain in discovery.

So I don't know, you know. I can only speculate about what it might be. That's my best guess about why that

document looks so weird and what it might mean. I wish I had a better answer for Your Honor.

THE COURT: And the second question I have is that, as to the 2005 Supplemental Agreements, you make a representation that you have a good faith basis for claiming that it exists. Can you be any more explicit about your factual basis for that belief?

MS. MILLER: So our basis for that belief is discussion with the current Trustee.

THE COURT: Thank you very much.

At this point, we will start our lunch break. When we come back at 2:15, we will go on to the argument by the DRA Parties and then the rebuttal arguments.

Thank you, Counsel, for these arguments this morning. I hope everyone has a little bit of a chance to rest. I'm going to a meeting, but I hope you can rest. And I will look forward to hearing you all at 2:15.

Take care. We are adjourned.

(At 12:50 PM, recess taken.)

(At 2:19 PM, proceedings reconvened.)

THE COURT: Buenas tardes. This is Judge Swain. Good afternoon, everyone.

MS. NG: Hi, Judge.

THE COURT: Hi, Lisa.

And so we are ready to continue the hearing with the

arguments from the DRA Parties. I have 16 minutes allocated. And who will be starting?

MR. MINTZ: Good afternoon, Your Honor. Doug Mintz of Orrick on behalf of the DRA Parties, and I'm joined by our co-counsel, Nayuan Zouairabani, from McConnell Valdes.

THE COURT: Good afternoon, Mr. Mintz and Mr. Zouairabani.

MR. MINTZ: Thank you. Good afternoon, Your Honor. I wish you and all of my friends and colleagues here health and safety, and hope we will get together sometime soon.

THE COURT: I share those hopes and communicate those good wishes as well.

MR. MINTZ: Thank you, Your Honor. Thank you.

THE COURT: We'll start your clock now.

MR. MINTZ: Thank you. Your Honor, as you know, the DRA Parties are not defendants here, but we have grave concerns about the sweep of some of the arguments that Mr. Bienenstock has made today and that the Oversight Board has made in some of their pleadings. Those stand to have an impact on certainly the DRA, but a number of parties that are not even in the room, if the Court were to adopt some of them, some wholecloth.

And the Monolines did a very good job at pushing back on a number of those points, but we will speak briefly on three of them and hopefully avoid too much repetition. I'll

speak first on preemption, which is limited by PROMESA with respect to Commonwealth law, and then Mr. Zouairabani will explain why Acts 30 and 31 are not appropriation statutes, and thus, not preempted; and how the Oversight Board has failed to provide any evidence that they have triggered the so-called clawback.

So first, with respect to preemption, PROMESA does not preempt Acts 30 and 31. Congress struck a careful balance with PROMESA and only displaced a narrow category of Commonwealth law, and Acts 30 and 31 are not among them.

In Section Four of PROMESA, Congress states "the provisions of this Act shall prevail over any general or specific provisions of territory law, state law or regulations that are inconsistent with this Act." PROMESA is not a steamroller that flattens every law in its path. Congress created a scalpel that removes only directly contradictory statutes, which makes sense. This is not some broad field preemption.

The Oversight Board argues that the Fiscal Plan and Budget preempt Acts 30 and 31. This stretches Section Four far beyond its breaking point. Acts 30 and 31 do not contradict any provision of the statute. They are consistent with the statute, as you'll see, and PROMESA makes no effort to preempt them expressly. To the contrary, the Fiscal Plan and Budget actually must incorporate relevant Commonwealth

law.

And we list a number of these provisions in our pleadings, but for one example, Section 201(b)(1)(N) of PROMESA says that any fiscal plan shall respect the lawful priorities and lawful liens as may be applicable in the Constitution, other laws or agreements of the covered territory.

So it's impossible to see how Congress intended for PROMESA to preempt provisions like Acts 30 and 31. We can debate what Acts 30 and 31 actually mean, and I'm sure we will at length, but clearly they remain in place. And because, as Mr. Zouairabani will explain, those statutes are not appropriation statutes, the excise tax revenues should belong to HTA, and DRA should have a lien on those revenues.

The Oversight Board tries to argue this is a settled issue. They state that the First Circuit and this Court have consistently held PROMESA preempts Puerto Rico statutes appropriating money because the budget necessarily must contemplate all expenditures. But those decisions, like *Vazquez Garced*, one -- simply state that the Commonwealth can't go and spend on its own outside the budget and fiscal plan. They don't have anything to do with Acts 30 and 31, which are not budgetary allocations or even appropriations, as Mr. Zouairabani will explain.

In essence, the Oversight Board wants to use the

Fiscal Plan, a document that can't be questioned by anyone, to take interests in the excise tax revenues. The DRA has a lien on those revenues through HTA, and those liens are property. Bankruptcy law has always been read to protect secured property interests from being taken without compensation. And case law makes clear, Supreme Court case law, that the Court should not construe a statute to interfere with the DRA's property rights, or anyone's property rights, without Congress' express statement of their intent to do so. And that's referencing *Security Industrial Bank*, 459 U.S. at 79.

The Oversight Board argues they aren't extinguishing the lien, just the revenue source behind the liens, but preserving the property right and the lien. But that's just word play. Extinguishing the funding source of those revenues without providing adequate replacement nullifies the lien and destroys the property interest.

We don't think this is the context to make such broad and overarching rulings that could affect so many people, including many people not here today, in a way that we believe would be unconstitutional. We believe those issues are not ripe today, and urge you not to head in that direction.

And with that, I will yield to Mr. Zouairabani at this point.

THE COURT: Thank you.

MR. ZOUAIRABANI TRINIDAD: Good afternoon, Your

Honor. Nayuan Zouairabani of McConnell Valdes on behalf of the DRA Parties.

THE COURT: Good afternoon.

MR. ZOUAIRABANI TRINIDAD: Good afternoon.

I would like to start off with the concept of appropriation. As explained in our brief, the Act 30-31 revenues do not satisfy the framework to be deemed an appropriation. They are not funds which flow into the Commonwealth Treasury for discretionary use, and they are not subject to annual allocation in the Commonwealth's budget on a fiscal year by fiscal year basis. Put another way, if it does not walk like a duck and does not quack like a duck, then it is very clearly not a duck.

The legislature knows how to create appropriation statutes, but chose not to do so in this case. The legislature's intent with the Act 30-31 revenues is therefore clear: One, they are not discretionary Commonwealth appropriations; two, they are required to be covered into a special deposit for the benefit of HTA for the specific purpose of repaying particular creditors of HTA; and three, the Commonwealth is obligated to transfer and convey these revenues to HTA under Article VI, Section Nine of the Constitution, subject only to the extraordinary exception of the clawback, which, as we will discuss shortly, has not occurred here.

Moreover, the First Circuit decisions of *Vazquez-Garced 1*, *Mendez-Nunez*, and *Andalusian* do not assist the FOMB in this regard. The first case concerns the reprogramming of items from the Commonwealth's annual budget; the second concerns litigation of whether -- reduction of the Puerto Rico Legislature's budget; and the third addressed a controversy over the ERS Statute, which requires specific annual allocations in the Commonwealth's budget.

All of these decisions revolve around particular items in the annual Commonwealth budget that require specific budgetary allocations. The Act 30-31 revenues do not. Hence, none of these cases are applicable to it.

The FOMB tries to bypass it by relying on two additional grounds. First, that Acts 30 and 31 are subject to the rights of future legislatures to review or amend; and second, their underlying belief that any other interpretation would make it impossible to fulfill their mandate under PROMESA.

The FOMB's first argument is irrelevant, because to date, neither the Commonwealth nor the Puerto Rico Legislature have taken any action to repeal or amend Acts 30 and 31. Rather, the only party that has consistently attempted to do so is the FOMB itself, acting outside their mandate through certified budgets and fiscal plans.

As discussed in our briefing, the FOMB cannot use

their certified budgets and plans as a means to amend Acts 30 and 31, because they do not possess the power to legislate. This second argument requires careful scrutiny as it can lead to a very dangerous path. And this relates both to the issue on appropriations, as well as preemption, as Counsel Mintz just discussed.

As the Court noted when the FOMB sought to appoint a chief transformation officer for PREPA, Congress created a carefully calibrated framework when it enacted PROMESA. It could have chosen to grant the FOMB greater control over the government and its operations, but it did not do so. PROMESA says what it means and it means what it says.

As Counsel Mintz explained, PROMESA specifically preserves Commonwealth law related to creditor priority, security and property rights. Moreover, Title III does not incorporate the majority of the payment priority under Section 507 of the Bankruptcy Code. And Section 314(b)(6) of PROMESA specifically mandates that, in confirming a Title III plan, the Court must consider whether available remedies under the Commonwealth laws and Constitution would result in a greater recovery to creditors than as provided in the plan.

Bear in mind, Your Honor, that Congress decided to make Title III's best interest test significantly different to the one set forth in Chapter Nine. The FOMB cannot, through the guise of fulfilling its mandate, take certain sections of

PROMESA out of context, just as they did in the *PREPA* case, by the way, to turn it into a weapon to preempt laws they deem problematic, like Acts 30 and 31, or even the Puerto Rico Constitution, as they alluded to in their Reply.

By the same token, they cannot use PROMESA to convert the Act 30-31 revenues into appropriations that can be discretionarily disposed of through certified plans and budgets. If we follow the FOMB down this rabbit hole, it will not stop until they essentially rewrite PROMESA to make it easier for them to plot forward with their current Fiscal Plans, Budgets, and Title III Plans in an attempt to obtain unfettered quasi monarchical powers over the Government of Puerto Rico and, ultimately, the people of Puerto Rico.

Now, having addressed the FOMB's preemption appropriation arguments, the FOMB is now forced to address the two ton elephant in the room. That is, the validity of a clawback.

As a housekeeping matter, Your Honor, it is the DRA's position that by raising the applicability of clawback in these proceedings, the FOMB has conferred this Court with jurisdiction to adjudicate this controversy on its merit, and thus, has waived any arguments regarding the limitations of Section 305 of PROMESA on this issue.

Having clarified with you, we now turn to why the FOMB has failed to show compliance with clawback. The

requirements for activation of a clawback under Puerto Rico law is quite complex, and it's not just limited to one element, as the FOMB oversimplifies in their briefings. Article VI, Sections Seven through Nine of the Puerto Rico Constitution, the OMB Act, and Acts 30 and 31 allow for the potential application of the clawback to the Act 30-31 revenues, but only when, one, the fiscal year began with a balanced budget; two, available resources for the fiscal year are insufficient to cover GO debt service; and three, the funds can only be used to pay interest and amortization on GO debt.

Under all other circumstances, Article VI, Section Nine of the Constitution mandates that, and I quote, "public funds shall only be disposed of for public purposes pursuant to law," and I end quote.

The FOMB makes no effort to evidence compliance with every one of these key factual thresholds. By limiting its briefing only to the single issue of whether the Commonwealth lacks sufficient available revenue, the FOMB essentially admits their failure. Accordingly, summary judgment cannot be granted on this matter due to FOMB's inability to meet its burden to show that there is no genuine issue of material fact with respect to any of the requirements for activation of a valid clawback.

Lastly, I would like to briefly address Counsel

Firestein and Counsel Kass' remarks regarding clawback. In a nutshell, they assert that clawback is not an issue because the impairment for the Contract Clause is based on the FOMB's preemption/appropriation argument under Title II of PROMESA.

(Whereupon the San Juan courtroom was disconnected from the teleconference call.)

(At 2:36 PM, the San Juan courtroom was reconnected with the teleconference call.)

MS. NG: Eric can hear us. The AT&T is good, Judge, right now.

THE COURT: I'm sorry. I'm hearing voices but not words. It's very faint.

MS. NG: Judge, can you hear me?

THE COURT: Yes. Who is that speaking?

MS. NG: It's me, Lisa.

THE COURT: Okay.

MS. NG: Eric says AT&T is fine. He can hear us.

MS. TACORONTE: Judge, can you hear me?

THE COURT: All right. And someone else just said, "Judge, can you hear me," so who is that?

MS. TACORONTE: It's Carmen, in San Juan, Your Honor.

THE COURT: Great. So I think we are all back in the same loop and we can proceed.

COURT REPORTER: Your Honor, would you like me to read what was being said before we were dropped?

THE COURT: Yes. Actually, that would be helpful. So if you will repeat from where Mr. Zouairabani was talking about what Mr. Firestein and Mr. Kass said about clawback.

(Whereupon the court reporter read back the record from page 143, line 1, to page 143, line 4.)

THE COURT: Oh, then you dropped. Okay.

So I will ask Mr. Zouairabani to come back and repeat the end of his argument from that point.

MR. ZOUAIRABANI TRINIDAD: Yes, Your Honor. Attorney Nayuan Zouairabani for the record. If I may?

THE COURT: Yes, please.

MR. ZOUAIRABANI TRINIDAD: So what follows that portion is: What they failed to mention, however, is if the Court were to reject the preemption/appropriation arguments for the reasons already stated, the Court will be required to address clawback to dispose of the FOMB's Contract Clause allegations. Plus, contrary to the FOMB's assertion otherwise, clawback is still very much in play in this proceeding.

And that was the end of my portion.

THE COURT: Thank you.

And so, Mr. Firestein, then Mr. Despins said that he was waiving the five minutes for the UCC and contributing them to your time allocation, which means I have you, the Oversight Board, down for 30 minutes now. And so, Mr. Firestein, are

you ready to proceed now?

Mr. Firestein, are you here?

(No response.)

THE COURT: Lisa, can you hear me?

MR. BIENENSTOCK: Your Honor, this is Martin Bienenstock. If it's okay, I'll start, and I'll hand things off to Messrs. Firestein and Kass.

THE COURT: That's fine. I'm just glad we haven't all lost each other again.

MR. BIENENSTOCK: Okay. Shall I start now?

THE COURT: Yes, please.

MR. BIENENSTOCK: Okay. Good afternoon, Your Honor. Martin Bienenstock of Proskauer Rose, LLP, for the Oversight Board, as Title III representative for the Commonwealth.

I'm going to go mostly in order of the points raised in the opposition this morning, Your Honor. The first issue related to the Monolines contending they need discovery and a trial, because they have a lien not only on money in the Sinking Fund, et cetera, at HTA, but also on money that should have been sent there.

And the reason that's wrong -- there are many reasons why that's wrong. First, the only entity that granted a security interest to them is HTA, and it could not grant a security interest in funds it didn't have. Second, they base this on a 2002 Security Agreement which the Court already

determined was unauthorized. Third, even if it had been authorized, the expensive grants of not only funds in the Sinking Fund but funds that should be there was beyond the resolution authorizing the deal in the first place, and, therefore, would have been ineffective.

The next point I want to address is the Moratorium Orders. Mr. Natbony admitted that, as evidence of why money was not funneled to the instrumentalities, were Commonwealth documents saying not to, whether the orders or the statutes, and I guess -- well, whatever he got in discovery indicating that was the case. That's not the issue here.

From the time that the statutes were preempted, that is the cause, at least the legal cause of not transferring. And at the latest, that would be the commencement of the Title III case for the Commonwealth. And if we were to go not only by Title III but by the preemptive provisions of Title II, then it could be as early as the creation of the Oversight Board and the imposition of the first certified budget. But I want to be clear.

THE COURT: Mr. --

MR. BIENENSTOCK: So before then --

THE COURT: Mr. Bienenstock.

MR. BIENENSTOCK: Before those two things happened, the cessation of the money was not due to PROMESA, because PROMESA didn't exist. And they have said they don't have a

claim for that within the meaning of the Bankruptcy Code; they are only entitled to equitable and declaratory relief. Well, the equitable and declaratory relief in the case law and in *Von Hoffman*, that some of the Monolines are fond of citing, is you nullify the offending statute. And as I explained earlier, the Board has no problem with that here.

I assume that when they say they have no claim but they have an entitlement to equitable relief, they are not being cute and clever and saying, well, the equitable relief we're entitled to is the payment of all the money, because that would mean they do have a claim because the Bankruptcy Code defines claim as right to payment.

So it really doesn't matter before Title III what the cause was. At best, if their contractual obligations were impaired, they would have a pre-petition unsecured claim for that impairment. But since all of the Commonwealth executive orders and moratorium laws went out of their way to preserve all the creditors' rights to principal and interest, et cetera, and so forth, our point is their contractual obligations were intact.

What all this, all these statutes and orders amounted to was nothing more than the debtor defaulted. And no matter how you look at it, at best, it can result in a pre-petition unsecured claim, which they say they don't have. They only want declaratory and equitable relief.

Mr. Natbony next mentioned that the Fiscal Plan didn't identify essential services; therefore, its certification doesn't count. And he wants discovery on that, and that to be the subject of a trial. There is no connection, though, as to what suddenly puts the Fiscal Plan into play in connection with the Monolines' Proofs of Claim.

To the extent they had collateral, they've asserted secured claims. They've asserted unsecured claims, priority claims. None of it depends on a fiscal plan. They've listed all their entitlements. And even if they got a list of essential services, they can't do anything about it, because the Court -- the Court is told by PROMESA, 106(e), the certification of fiscal plans can't be -- is outside the Court's jurisdiction.

On Section 544(b), Mr. Natbony says a trustee under 301(c)(7) is not a trustee in bankruptcy for purposes of the Uniform Commercial Code in Puerto Rico. Suffice it to say we beg to differ. What other trustee is there in this case than a Bankruptcy Trustee, a Title III Trustee?

Insofar as their statement that I misunderstood their argument about the deposit account, the bottom line is this: They cannot have a security interest in a deposit account without a perfected security interest, without a Deposit Account Control Agreement, a DACA, unless they had a perfected security interest in cash, either by possession or by an

authenticated statement of the Commonwealth.

And as I pointed out in my early part of my opening, the statutes they point -- the Monolines point to give them that authenticated security interest say the money is being held for the benefit of HTA to use for its corporate purposes, not for the benefit of the bondholders.

As far as the *Kentucky Employees* case, suffice it to say, from its very outset, it relies on Section 959(b). But the Monolines' point, they contend it doesn't rely on 959(b), that that's an ancillary issue, and that what it really says is statutes have to be obeyed, even in bankruptcy.

I guess that's where the rubber hits the road here, Your Honor. If they are right, then I suppose all creditors from now on of municipalities will require the states and the municipalities to pass laws that say all debt shall be paid timely, no matter what, or just all debt shall be paid timely. And then, according to the Monolines, they all have to be specifically performed, which is the equivalent of giving them a super priority during a bankruptcy in contradiction of what the Bankruptcy Code provisions and Title III say. And I think simply to state their proposition is to refute it.

To clarify something that came up this morning and was raised by some of the speakers, while we are -- we, the Board, as the Commonwealth's Title III representative, are primarily concerned, and we brought these Complaints and

Summary Judgment Motion to pave the way for a plan of adjustment, and for that, we need to know the amount of secured claims, because they have to be paid the value of their collateral, we have asked in several instances for disallowance of the unsecured claims. But as I explained this morning, what I carve out of that is, to the extent they have unsecured claims for the non-impairment statutes, where the statute says to all holders of bonds that the transfers shall not be affected adversely to the instrumentality, those unsecured claims we're not asking be disallowed at this time.

I want to emphasize, on the preemption point, the different speakers took different approaches to this, including the DRA Parties just now, but from the Commonwealth's point of view and the Oversight Board's, preemption is a preemption of one statute by a Federal Statute. It's not a fiscal plan. It's not a budget. It's not something else. It's a statute. And that makes a difference here. Because we've said, for instance, 202, which gives the Oversight Board budget authority, preempts these statutes.

Now, why does it preempt them? Because 202 says the Oversight Board should determine what to spend money on, and these pre-PROMESA and pre-petition statutes purport to make their own decisions on what to spend money on, inconsistent with letting the Oversight Board determine. That's it.

That's what preempts these statutes, not the actual budget that the Oversight Board actually determines later.

More importantly, Title III preempts all statutes that would purport to pay pre-petition -- pre-petition debt. And Your Honor asked the question earlier about the timing of how long does the preemption last, and in the context of 202, because the Board's budgetary power doesn't last forever, I was thinking and answering in respect of, well, how long does it last? It might last longer than the debt is repaid under the Title III Plan, etc.

But I think the way to answer that question is Title III deals with the debt. It would be completely inconsistent with PROMESA and Title III for the debt to be dealt with under a plan of adjustment and then for a statute to pop up providing for additional payments to HTA to the benefit of its creditors. So, from our point of view, because of Title III, any debt dealt with in the Title III preempts forever application of statutes that are intended to pay that debt.

THE COURT: And so are you saying that there has not yet been and will not be, until confirmation of a plan, a forever preemption of the statutes, or that the Title II preemption somehow goes year to year but leaves a subsisting liability that then gets dealt with in the plan along with the future liability? What is it for --

MR. BIENENSTOCK: I'm saying that, in the same way

the Board's power to decide what expenses to authorize preempts the relevant statutes here, the Title III, which determines how to deal with debt, preempts the statutes, and preempted them as of the time PROMESA was enacted and the Board was created.

That's what's going to determine how to pay the debt, not contrary statutes. Otherwise, any municipality could pass a law saying, after the bankruptcy, we're going to pay off -- we shall pay X, Y, and Z debt. That would totally gut the purpose of the debt restructuring statute.

THE COURT: But what if Title III was never invoked? What if you ended up having a wonderful, happy experience under Title VI, or for some reason the Title III was discontinued? So is there a bringing and, you know, departing Title III preemption from the time that PROMESA is enacted?

I just don't really understand how that would work.

MR. BIENENSTOCK: Well, if Title VI resolves debt for this purpose, the same as Title III, so I think that would eliminate the statute forever, certainly from the time it did that. If the Title III case were dismissed, then I could see an argument that the statute, the preempted statute would no longer be preempted. But if the Title III case or Title VI results in a restructuring of debt, statutes purporting to pay that debt could never be reactivated, because that would undo all the work of the Title III or the Title VI.

THE COURT: And when you say Title III preempts as of the date PROMESA was enacted, where here the Commonwealth didn't start its Title III until a year after PROMESA was enacted, what was the situation vis-a-vis your Title III preemption construct in 2016 and early 2017?

MR. BIENENSTOCK: Well, at that time, Your Honor, the reason I used the earlier date was that the Oversight Board was given budget authority to determine what to spend money on, and that preempted the statutes. Additionally, once the Title III was commenced, obviously it controlled how and -- how this debt would be paid.

THE COURT: Thank you.

MR. BIENENSTOCK: The non-entrenchment issue was raised and questioned as to its relevance. Its relevance is simply that the statutes they're referring to can be repealed. They're definitely not enforceable against the current legislature's, but they don't really need to be repealed because 202 and Title III preempt them anyway. So it would be double duty in effect, or belt and suspenders at best.

Von Hoffman was a Contract Clause case outside of bankruptcy. That's why there's equitable relief. It doesn't stand for the proposition that, in bankruptcy, statutes get to be specifically enforced with mandamus, as Ambac urged. They have a pre-petition, unsecured claim at best for the lack of transferring the money to the different instrumentalities.

Under Section 407, Your Honor, the reason summary judgment is appropriate is it's simply that the first prong -- I think everyone agrees that there needs to be property transferred of a territorial instrumentality. And the only way the Monolines get to satisfy that is to say Your Honor was wrong on the Stay Hearing and they have a security interest in Commonwealth property. But then they also lose on the second prong, saying that there was a transfer. What they're complaining about is there was no transfer, and the argument that there was a transfer between Commonwealth bank accounts, whether or not they had different restrictions on them, is a red herring, because -- or a straw man, because the transfer between the bank accounts caused no harm to anybody.

So they're just trying to check the box, to say there was a transfer, but that transfer between bank accounts is not what is being complained about. What is being complained about is there was no transfer to the instrumentality.

On the second prong of 407, we stand on what I said earlier about their legislative history having no validity for the reasons I mentioned earlier. I think, frankly, that was accentuated when the argument was made by Ambac that the fact that Congress did not change the legislative report after Congressman Grijalva made his statement in the Congressional Record shows Congress agreed that the legislative report -- I am not aware of any time that happens. That's what

Congressional Reports are for.

But the real reason why they lose on this point is that the statute is clear. It says what it says. It requires a transfer over a territorial instrumentality, and they don't have it. They're asking the Court to rewrite the statute for their own purpose.

On the issue of the Contract Clause, as I mentioned earlier, we're taking them at their word that they have no claim and they're not going to come around the back end and say, well, they had a claim for an equitable relief in the form of money. So basically, they have, at best, an unsecured claim for the -- any Contract Clause impairment that existed up to the Title III case being commenced.

Okay. They had a general -- pre-petition, general unsecured claim. For the purposes for which we brought the Summary Judgment Motion, that would be an excellent ruling. And the amount of that claim can be quantified at any time. What we ask for is they don't have any secured claims.

Once the Title III case commenced, and at the latest -- it probably doesn't matter whether it was a few months earlier or later. Once the Title III case commenced, it was Title III that prevented payments to the instrumentalities on the pre-petition obligations, and the statutes --

THE COURT: And that's because the Oversight Board didn't consent to them being paid? Title III and 303 preserve

Commonwealth power, and 305 allows the Oversight Board to consent to expenditures. And there's no 363. So what is it in PROMESA that absolutely prevents the payments from being made?

(No response.)

THE COURT: Are you still there? Oh, no.

Can anyone hear me at all?

MR. FIRESTEIN: Yes, Your Honor. This is Michael Firestein. I can. Can you hear me?

THE COURT: I can hear you.

MR. FIRESTEIN: Well, I will tell you that the dashboard, just so you know, the dashboard like -- I wasn't even on it, and it was randomly muting me and kicking me off. So there's some -- there is a gremlin amidst.

THE COURT: Oh, boy. Ms. Ng, can you hear Mr. Firestein and me?

MS. NG: Yes, I hear you, Judge. I don't see Mr. Bienenstock on anymore, so he may be trying to log back in.

THE COURT: Okay. And you still see other people on the dashboard?

MS. NG: Yes.

THE COURT: Okay. So let's wait and see if Mr. Bienenstock comes back.

MS. NG: Amy, can you hear us?

COURT REPORTER: Yes, Lisa. I'm still here. Thank you.

THE COURT: Mr. Firestein, can you text Mr. Bienenstock and see where he is in the process?

MR. FIRESTEIN: Well, actually, I cannot text him, but I know there's people who are on this line that surely can.

THE COURT: Okay. Whoever can text Mr. Bienenstock, please do.

MR. BIENENSTOCK: Your Honor.

THE COURT: Yes.

MR. BIENENSTOCK: I'm terribly sorry. I don't know how or why I was disconnected, but I was.

THE COURT: All right. Well, welcome back. What was the last thing that you heard?

MR. BIENENSTOCK: I think -- I'm not sure if Your Honor was asking a question. I think it was about -- I had been addressing the contract, the timing of the Contract Clause, and once the Title III case commenced, that was the cause of any impairment.

THE COURT: Yes. And so let me see if I can reconstruct my question. Yes. My question was in reaction to your assertion that once the Title III case commenced, Title III itself prevented payments being made on the debt. And I was asking you what in Title III was an absolute prohibition,

since 303 preserves governmental power. Was it the Oversight Board's determination not to consent to the payments being made that is the Title III prevention, or is it some other mechanism?

And since we had this mix-up, I'm going to reset you at ten minutes left, because my clock says like 22 minutes. So I'll give you ten minutes. All right?

MR. BIENENSTOCK: All right. But that -- does the ten include any time I'd want to give to my colleagues?

THE COURT: It would.

MR. BIENENSTOCK: Okay. Then I'm going to try to take less than five.

But to answer your question, Your Honor, once Title III was commenced, it was up to the Oversight Board, as the Commonwealth's representative, whether to pay, from the very first instance. And that's what caused the nonpayment. Power over the Commonwealth's payment of prior debt was given over to the Oversight Board. That's the inconsistency between Title III for this purpose and the revenue statutes we're dealing with.

THE COURT: And given the Oversight Board's decision not to authorize those payments, the Commonwealth couldn't do anything else and that statute couldn't --

MR. BIENENSTOCK: But it wasn't so much the actual decision not to, and that might manifest the inconsistency or

the preemption, but it was the fact that the power to decide was given to the Commonwealth through the Oversight Board and taken away from the pre-petition statute that would otherwise control.

THE COURT: Thank you.

MR. BIENENSTOCK: Okay. Thanks.

On the issue of acceleration, Your Honor, the fact is that, in bankruptcy, you have to file your whole claim. So the GO, General Obligation debt didn't file one year's payment on their 18 billion of debt. They filed for 18 billion, and that is the claim. And that gets treated under the Plan. So that is the acceleration. Like it or not, the federal law effectively makes all of the money owing, and under a plan, you can figure out how you're going to pay it.

In terms of the argument that the litigants were deprived of liens on money that would have been encumbered, we previously cited to the Court -- I think *Las Vegas Monorail* was one decision, the promises to secure are nothing but unsecured claims.

The continued refrain we hear from the Monolines, that government debtors have to comply with statutes, just restates, you know, where the rubber hits the road. That would mean any statute requiring payment of pre-petition debt has to be paid in full as a priority over everything else, notwithstanding that that's not what Title III or the

Bankruptcy Code provide.

Your Honor, the rest of my time I'd like to give to Mr. Firestein.

THE COURT: Thank you, Mr. Bienenstock.

Mr. Firestein.

MR. FIRESTEIN: Yes, Your Honor. Can you hear me now?

THE COURT: Yes. You have six and three-quarter minutes.

MR. FIRESTEIN: Okay. I probably will yield a couple of minutes to Mr. Kass, but let me just -- again, it's Michael Firestein of Proskauer, on behalf of the moving party and the Commonwealth here.

I just want to tick off a few things that relate to some of the observations we heard about 56(d). One, I think Mr. Natbony indicated that it was sufficient for them to merely file a 56(d) request and that that was enough, and he really only needed to ask for general information. I beg to differ with that. I don't think that's what the law is.

I think the law is that it does require that defendants, quote -- and this is again from *Bad Paper*, and I'll give another cite as well, identify the specific facts they seek or explain how the information they seek, if collected, would suffice to defeat the summary judgment motion. That was aptly cited in each of our responses to

this, but -- and the *Bad Paper* case involved generalized requests for information regarding certain transactions similar to the requests that are made here. And that Court rejected those requests as akin to speculation, that there's some relevant evidence not yet discovered that will never suffice to support 56(d) motions. The First Circuit has likewise adhered to the same ruling and the same standard in the *Mattoon* case, which I believe we cited in our papers.

Mr. Natbony also indicated that he -- or he took issue with the notion that, you know, the fact that we were -- suggested that they file the fulsome opposition is somehow -- you know, makes their filing of a 56(d) request improper. That is not what we argued. We didn't argue that a request for 56(d) relief, in the alternative, was improper. But what we did do was cite the case law, including the *C.B. Trucking* case, as well as the *Westernbank versus Kachkar*, and I hope I'm not mispronouncing it, in which the fact that a fulsome opposition has been filed can militate against the notion that 56(d), as an alternative request for relief, is something, you know, that is necessary. And we'll stand by our citation to that authority, but I wanted to be clear about what our argument actually was.

In addition, Mr. Natbony made an observation that we needed a full or fuller record of some kind to interpret statutes. I don't see any information that they've requested

that is going to go to the issue of what the interpretation of the statutes should be that is different than what the Court had in front of it and was able to clearly define and interpret, which is the Court's prerogative in the context of the Lift Stay.

I'm not going to reargue those points. The Court's position on those issues is pretty straight forward. But I do take issue and disagree with the notion that somehow a bigger record of some kind is going to make for a better or different interpretation, which there's no information to suggest that. And indeed, the type of information that they are talking about is the type of information that the Court has already found wanting in terms of value relating to interpretation.

And not to be repetitive of it, but the notion of flow of funds or accounting issues and the emphasis on Fund 278, you know, I think the *McGirt* case that came out this year from the United States Supreme Court basically stands for the proposition that historical practice is simply not relevant to statutory interpretation. And the Court has already reached a similar conclusion.

Similarly, the rationale for -- or the basis upon which the failure to transfer the HTA allocable revenues, I mean, they put the cart before the horse. They don't have a protected lien. There's no property interest that exists here, which we -- reaffirmed by the Court in the 926 Order, at

least as it relates to HTA. So we stand by the proposition that the absence of relevance as to why the money was transferred is the correct conclusion. The issue is, is there a consequence for not having transferred that money.

Focusing on PRIFA for a moment, I know that we had some discussion with the Court about the Trust Agreement --

(Sound played.)

MR. FIRESTEIN: -- and I indicated that they rely on that for the proposition that -- for their own positions. Well, the Trust Agreement only goes to -- in any event, the Trust Agreement only goes to the relationship between the Trustee, the bondholders and PRIFA. The Commonwealth isn't even a party. So the rights, if any, that would exist relative to the Commonwealth derive from the Enabling Act.

And to the discussion you had with Ms. Miller relating to the issues about the original Trust Agreement or other edifications of this, the fact of the matter is that I believe it was Ms. Miller's Declaration that attached to the motions that they filed in January, what they believed to be true and correct copies of the Lift Stay. So the fact that they are moving back and forth between this issue in order to create some sort of factual dispute I think goes directly to the issue of needing to have something specific that they had in mind, rather than just throwing dust up against the wall.

The last point that I want to make has to do with

what their right was to pursue discovery. They talk about their -- what they want to have, but what they don't dispute is that they didn't do anything about it. They simply didn't ask in any way, shape or form. And there is nothing that contradicts my declaration relative to what occurred concerning the entire time in which these motions have been pending.

And with that, Your Honor, in the absence of questions, I will yield to Mr. Kass for the remaining moment.

THE COURT: Thank you.

Mr. Kass, talk fast.

MR. KASS: Good afternoon, Your Honor. Colin Kass for the Oversight Board.

In light of the limited amount of time, I just want to make one point relating to CCDA. During the defendants' argument, they pointed to a footnote in the Oversight Board's Reply Brief where we note that, at most, defendants have bare legal title to the funds in the Tourism account. They took that quote out of context. What we were saying is that --

(Sound played.)

THE COURT: You can finish.

MR. KASS: May I finish, Your Honor?

THE COURT: Yes.

MR. KASS: What we were saying was, at most, they have a possessory interest in these funds. The ownership of

these dollars remains with the Commonwealth. And that is what Section 407 is getting at, is who actually owns the property.

And if you think about what defendants are seeking, they are not seeking to get the value of the Tourism Company's possessory interest. They're seeking to deprive the Commonwealth of the value of its own property, which is the ownership in the occupancy taxes. And we think that is improper.

And with that, I'll yield.

THE COURT: Thank you very much.

I'd again like to thank all counsel for these very well thought out, detailed, and well-articulated arguments that will be quite helpful to me in tackling the appropriate disposition of this motion practice. The Motion is taken under advisement.

This concludes today's hearing. The next scheduled hearing date is the October Omni, which is scheduled for October 28th, 2020. And that hearing will occur telephonically as well. The Court will issue a procedures order closer to the date of that hearing.

I extend my sincere thanks to the court staff in Puerto Rico, Boston, and New York, and to all who participated today. I wish you all good health and continued safety in these times. So stay safe and keep well, everyone. And I will look forward to the next hearing.

We are adjourned.

(At 3:16 PM, proceedings concluded.)

* * *

U.S. DISTRICT COURT)

DISTRICT OF PUERTO RICO)

I certify that this transcript consisting of 167 pages is a true and accurate transcription to the best of my ability of the proceedings in this case before the Honorable United States District Court Judge Laura Taylor Swain, and the Honorable United States Magistrate Judge Judith Gail Dein on September 23, 2020.

S/ Amy Walker

Amy Walker, CSR 3799

Official Court Reporter